

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT DAYTON

ROGER DEAN GILLISPIE,

Plaintiff,

CASE NO. 3:13-cv-416-TMR

-VS-

THE CITY OF MIAMI TOWNSHIP, ET AL.,) JURY TRIAL

Defendants.

VOLUME VI

TRANSCRIPT OF PROCEEDINGS

THE HONORABLE **THOMAS M. ROSE**,
UNITED STATES DISTRICT JUDGE, PRESIDING
MONDAY, NOVEMBER 14, 2022
DAYTON, OH

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Also Present: Roger Dean Gillispie, plaintiff; Valerie Barajas, paralegal; Matt Thibodeau, paralegal; Jeff Weber, IT

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1 P-R-O-C-E-E-D-I-N-G-S 8:51 A.M.

2 (In chambers at 8:51 a.m.)

3 THE COURT: We do have some bumps in the road.
4 Juror Number 1 is ill. Well, I shouldn't say he's ill. He
5 tested positive. He did so not because of being sick. He has
6 a mother that's in an assisted living facility and every time
7 he goes to visit his mom on the weekends he tests. He tested
8 positive. He has no symptoms. He actually reported here
9 today. We've got him isolated downstairs and set apart from
10 everybody else.

11 My thought is that, if there are no objections, based
12 upon that, the Court would find just cause to excuse him and
13 proceed with trial.

14 MR. KANOVITZ: Some questions. I don't know how the
15 court system is set up. Does he have the ability to watch
16 testimony, like some courts have like a remote setup?

17 THE COURT: No.

18 Anybody's thoughts?

19 MS. FRICK: Which one is 1?

20 THE COURT: Clear down at the end. The fellow.

21 MR. McLANDRICH: I mean, the only other option would
22 seem to be if he could be sort of isolated in the jury box far
23 enough away from everybody else.

24 THE COURT: I am afraid that would make everybody
25 nervous.

1 MS. FRICK: Does the rest of the jury know?

2 THE COURT: What?

3 MS. FRICK: Does the rest of the jury know at this
4 point?

5 THE COURT: No. They know nothing.

6 MR. KANOVITZ: There is a good chance that two of
7 them are positive and haven't even tested, just statistically.

8 THE COURT: We can proceed with six jurors, but, you
9 know, this would bring us down to seven.

10 MR. KANOVITZ: I'm trying to brainstorm a solution,
11 but it doesn't really sound like there is one.

12 THE COURT: I mean, you know, if he tests -- he
13 doesn't have symptoms right now. He could get symptoms, I
14 mean. There is all sorts of stuff that could develop from
15 that, I think.

16 MR. McLANDRICH: I mean, you know, I think it's kind
17 of like you said. It seems like good cause. I hate to see
18 him go.

19 THE COURT: I hate to see any of my jurors go.

20 MR. McLANDRICH: Right, exactly.

21 THE COURT: The funny thing is, I tried -- how many
22 did I try during the pandemic?

23 MR. MORRIS: Three.

24 THE COURT: I tried three during the pandemic, all
25 lengthy trials, and never lost a juror. And now we got

1 supposedly through the pandemic.

2 MR. MAYER: We had two criminal ones with 12, 14
3 jurors with the alternates.

4 THE COURT: Anything?

5 MR. KANOVITZ: I can't think of anything, you know.

6 MS. FRICK: No.

7 THE COURT: Well, based upon the fact that Juror
8 Number 1 has reported as indicated and indicated or told the
9 Court that he has tested positive, the Court finds just cause
10 that he can be excused, and we will proceed with seven jurors.

11 What I'm going to tell the jury is that I've excused him
12 for just cause.

13 (David Owens now present.)

14 MR. KANOVITZ: Is there any chance they will confuse
15 that? Should we just tell them that he's sick?

16 THE COURT: Let me bring Mr. Owens up to date. We
17 have a juror that visited Mom in the assisted living over the
18 weekend, but he tests every time he goes to visit Mom. He
19 tested positive. He actually reported here today, but I have
20 got him isolated downstairs. My proposed action is the fact
21 that I am going to -- I believe that's just cause to excuse
22 him and proceed with seven jurors.

23 MR. OWENS: I'm two for two in 2022 in this
24 happening.

25 THE COURT: What's that?

1 MR. OWENS: I'm two for two in jury trials this
2 happening.

3 MS. FRICK: It's your fault.

4 THE COURT: It is your fault because I was telling
5 them I went through the pandemic and three fairly lengthy
6 trials and never lost a juror.

7 I don't know anything else to do. I mean, we don't have
8 the facilities to put him in some isolation booth and let him
9 watch and participate.

10 My inclination is not -- to just say just cause.

11 The problem with going into any great detail of why I've
12 let him go, one, I don't know whether there is any kind of
13 prohibition for me telling that to the rest of the jurors or
14 not, but it gets them very nervous, I would think.

15 MR. KANOVITZ: My concern would be that they would
16 confuse the issue, but maybe just say he is unable to continue
17 to participate.

18 THE COURT: Let me come up with something. I will
19 come up with something like that.

20 Any other suggestions?

21 MR. MAYER: No, Judge.

22 THE COURT: Callum?

23 MR. MORRIS: No.

24 THE COURT: The other thing, there's a little
25 scheduling hiccup. I have got to recess right at 10:15 this

1 morning because I have got to walk down the hall, and they are
2 dedicating this reentry program to one of our probation
3 officers that died of melanoma several years ago, and I've got
4 to say a couple words down there. It is not going to extend
5 the break or anything, it's just I have got to break right at
6 10:15 because Judge Rice has made provisions for me to say
7 something between 10:15 and 10:30. I will try to go down
8 right away. That way I won't delay the break.

9 It's also my understanding that there has been an
10 agreement to modify the stipulations?

11 MR. McLANDRICH: The dates of incarceration.

12 THE COURT: So what I was going to do at this point
13 in time, I was simply going to, right now, say that "The
14 parties have corrected a portion of their stipulations. The
15 parties have removed the stipulation that Gillispie was
16 continuously incarcerated between September the 5th, 1990, and
17 December the 22nd of 2011, and corrected it so that they have
18 now stipulated or agreed that Gillispie was confined for
19 approximately two weeks after his arrest and on bond until his
20 first trial in February of 1991. Gillispie was then
21 continuously incarcerated between February the 5th, 1991, and
22 December the 22nd of 2011. Therefore, you must treat the
23 corrected facts as having been proven for the purpose of this
24 case. I will include a full recitation of the parties'
25 stipulations in my final set of instructions."

1 MR. McLANDRICH: Seems fair.

2 THE COURT: My understanding, we're going to insert
3 another witness in the middle of Mr. Moore, or Detective
4 Moore? That's Mr. Lieberman?

5 MR. KANOVITZ: Yes.

6 THE COURT: And then once Mr. Lieberman's done,
7 Mr. Moore goes back on, and we are going to finish him up?

8 MR. KANOVITZ: (Nodded head.)

9 THE COURT: Okay.

10 MR. McLANDRICH: Was tomorrow the day that you had
11 to leave at 3:30?

12 THE COURT: Leave at 3:30.

13 MR. OWENS: And are we here until 4:30 today?

14 THE COURT: We could be. What I'm willing to do is
15 I'm willing to possibly give a little on my end between 4 and
16 4:30, to be real honest, for this week.

17 MR. OWENS: If we need to have somebody else waiting
18 in the wings.

19 THE COURT: Let's see how we are developing at that
20 point in time.

21 MR. OWENS: Sure.

22 THE COURT: I'm not sure we're able to plan a whole
23 lot, but, you know, we'll just see where we are.

24 So, counsel for plaintiff, anything?

25 MR. KANOVITZ: Nothing further.

1 MR. McLANDRICH: You know, the one question -- and
2 it doesn't have to be necessarily addressed now, but just to
3 get it on the radar screen, so to speak, there was the email
4 about withdrawing the Fourth Amendment.

5 THE COURT: Oh, I should have brought that up. I'm
6 sorry. I should have brought that up.

7 MR. KANOVITZ: So it seems like we need to file an
8 amended complaint that just excludes those claims, or can we
9 just interlineate?

10 THE COURT: My thought is -- here's what I thought.
11 Can we -- can you -- can the parties agree to submit to me a
12 proposed agreed entry dropping those?

13 MR. McLANDRICH: Sure. Yeah, I would think so.

14 THE COURT: I just don't want to -- I really
15 don't -- if there is any way to avoid an amended complaint
16 right in the middle of trial. As a matter of fact, I
17 shouldn't admit this, but I have never done that. I have
18 never had that done in the middle of trial.

19 MR. McLANDRICH: I think we can avoid that. I mean,
20 the only discussion that I think we need to have so we make
21 sure we are on the same page in terms of what claims are
22 actually going away as a result of the Fourth Amendment claim,
23 malicious prosecution would certainly seem to be one. I just
24 don't know if there is --

25 MR. KANOVITZ: I think that is the scope of our

1 Fourth Amendment claims, is malicious pros.

2 MR. McLANDRICH: Well, there's been evidence put
3 on -- and this is where my brain is going -- evidence put on
4 that, well, he shouldn't have shown a photo array to the
5 victims. That strikes me as a Fourth Amendment claim, not a
6 due process fair trial.

7 MR. KANOVITZ: It's a due process fair trial claim
8 going into the witness identification procedure. It's not a
9 Fourth Amendment.

10 MR. McLANDRICH: It's a procedure issue, right? We
11 can talk about that off the record.

12 THE COURT: Here's -- my only hope is that whatever
13 you do, you can get it to us fairly quickly so we know --
14 because it has an effect upon our consideration of the drafts
15 of the instructions and things like that. It just saves us --
16 I don't know how much it saves us, but it clarifies things.
17 But that's the way I would propose. I think I would be
18 comfortable if we can get some kind of an agreed judgment
19 entry submitted to me that I could sign. That way we don't
20 have to go through some type of process that I'm not -- not
21 that I am not familiar with all processes.

22 (Concluded at 9:02 a.m.)

23 (Jury in at 9:08 a.m.)

24 (In open court at 9:09 a.m.)

25 THE COURT: Ladies and gentlemen, welcome back.

1 Hopefully everyone had a restful and extended weekend.

2 I'm assuming everybody was able to abide by the Court's
3 admonitions. Anybody that wasn't?

4 (No verbal response.)

5 THE COURT: Okay. Well, ladies and gentlemen, I do
6 need to tell you that I have excused Juror Number 1 for just
7 cause. He's not able to continue to participate in the trial,
8 but I am going to ask you please do not speculate or discuss
9 the reasons for the Court's finding of just cause and this
10 excusal.

11 The other thing I need to share with you this morning,
12 ladies and gentlemen, is the fact that the parties have
13 corrected a portion of their stipulations, the stipulations I
14 read to you earlier as we started the evidence presentation.

15 The parties have removed from that stipulation "that
16 Gillispie was continuously incarcerated between September the
17 5th, 1990, and December the 22nd, 2011," and corrected it so
18 that they have now stipulated or agreed "that Gillispie was
19 confined for approximately two weeks after his arrest and then
20 on bond until his first trial in February of 1991. Gillispie
21 was continuously incarcerated between February 5th of 1991 and
22 December the 22nd of 2011. Therefore, you must treat the
23 corrected facts as having been proven for the purpose of this
24 case."

25 The Court will include a full recitation of the parties'

1 stipulations as modified in my final set of instructions for
2 you before your deliberations.

3 All right. It's also my understanding that we are --
4 based upon the availability of witnesses, we may be taking
5 another witness out of order. So please bear with us. We are
6 trying to move along as expeditiously as possible, but we have
7 to make some modifications.

8 So it's my understanding that we are going to break at
9 this time the testimony of Detective Moore to call another
10 witness for the plaintiff.

11 Counsel ready to proceed?

12 MR. KANOVITZ: Yes.

13 THE COURT: Counsel?

14 MR. McLANDRICH: Yes, sir.

15 MR. HERMAN: Yes.

16 THE COURT: Next witness.

17 MR. KANOVITZ: At this time, plaintiff calls Dennis
18 Lieberman.

19 **DENNIS LIEBERMAN, PLAINTIFF'S WITNESS, SWORN**

20 THE COURT: Mr. Lieberman, if you'll please try to
21 keep your voice up. I don't think that will be a problem for
22 you, but keep your voice up. You have your microphone there
23 for you. If you get it too close to you, it muffles you; if
24 you get it too far away, it loses you. So if you keep your
25 voice up so that we can all hear your responses, that will

1 solve the problem.

2 THE WITNESS: I will try, Your Honor. Thank you.

3 THE COURT: You may inquire.

4 MR. KANOVITZ: Thank you, Your Honor.

5 **DIRECT EXAMINATION**

6 BY MR. KANOVITZ:

7 Q. Good morning.

8 A. Good morning.

9 Q. Could you introduce yourself to the jury, please?

10 A. Yes. My name is Dennis Lieberman. It's

11 L-I-E-B-E-R-M-A-N.

12 Q. Where you from, sir?

13 A. Originally, I was born in South Bend, Indiana. I went
14 to Miami University, and then University of Dayton School of
15 Law. So I've lived in the Dayton area since 1975.

16 Q. And what do you do for a living?

17 A. I'm an attorney.

18 Q. Are you currently a member of the Ohio Bar?

19 A. I am.

20 Q. When did you first become a member of the Ohio Bar?

21 A. I became a member of the Ohio Bar in 1978, upon
22 graduation from Dayton School of Law.

23 Q. And do you actually practice law?

24 A. I do, yes.

25 Q. What sort of practice do you do?

1 A. Primarily criminal law. It didn't start out that way,
2 but that's where it's ended up over the years.

3 Q. Got it. And do you do any teaching in addition to
4 practice?

5 A. I do. I'm an adjunct professor at the University of
6 Dayton School of Law.

7 Q. And what do you teach there?

8 A. I teach some criminal practice. Mostly trial practice,
9 jury, and national mock trial.

10 Q. You mentioned your educational background. Did you
11 graduate with honors?

12 A. I did. I graduated from the school of law cum laude.

13 Q. And can you quickly take us through your work background
14 since graduation?

15 A. Upon graduation, I -- I had actually taken the Indiana
16 Bar my third year in law school so that I could have a
17 license and wouldn't have to wait for six months before the
18 Ohio Bar did their exam. So I passed the Indiana Bar and
19 was hired by a firm by the name of Smith and Schnacke, which
20 no longer exists, but it used to be a very large firm of
21 about 120 lawyers. I was on the complex litigation side of
22 that firm where we would do antitrust and securities-type
23 litigation.

24 And then from there, I -- after a couple years, I
25 realized that with that type of practice I wasn't really

1 going to get into the courtroom very much, and I really
2 wanted to get into the courtroom. So I left there and
3 started my own firm of Lieberman, Landon, Garrison, Smith in
4 1980 and practiced there for about four years when we then
5 merged with another firm and became Flanagan, Lieberman,
6 Hoffmann & Swaim, which we remained until the passing of
7 three of my named partners. And so now the name of the firm
8 is Flanagan, Lieberman & Rambo.

9 Q. Thank you. Switching topics, did there come a time where
10 you were retained to represent Dean Gillispie?

11 A. Yes.

12 Q. And how did -- do you know how you came to be retained?
13 How they found you?

14 A. It's my recollection that I had a friend that I went to
15 law school with whose in-law recommended me to the Gillispie
16 family and that that is -- that's how they found out about
17 me, and that's how I then met them.

18 Q. Do you know who you spoke to first in the family?

19 A. I don't remember.

20 Q. How long had you been practicing law at the time that you
21 took on the defense?

22 A. It was 12 or 13 years that I had been practicing.

23 Q. And in that time, did you already have experience with
24 sexual assault cases?

25 A. Yes, yes.

1 Q. Did you also have experience with cases that involved
2 eyewitness identifications?

3 A. Absolutely, yes.

4 Q. And in terms of how those cases go, what was your
5 assessment of the strength of the defense in this case?

6 A. After looking at this case, you know, I had to look at
7 the weaknesses of the case and the strengths of the case, as
8 you always do. And what this was was a case of pure
9 identification. There was no hard evidence. By that I mean
10 there was no DNA -- although back then that was just
11 starting to evolve -- no fingerprints, nothing, physical
12 evidence that would connect Dean to the actual charges.

13 So I looked at that, and I -- and I thought that that
14 meant that this case was purely an identification case.
15 Now, the weakness of the case was the fact that there were
16 three women who were identifying him, but two of them were
17 twins at the same incident, and so really it equated more to
18 two different situations rather than three. But, still, you
19 have to evaluate that and say, yeah, you know, that's --
20 that's a weakness to it, that there were actually more than
21 one woman that identified him.

22 Q. Did the age of the case figure into your assessment at
23 all?

24 A. It did. The original identification in the case was --
25 formed a composite. And by a composite, that's like a

1 drawing that the police will do of the person who they
2 believe committed the offense. And that was done initially,
3 as was the identification of the person.

4 And then I think it was a couple years later when the
5 case was reinvestigated, there ended up being shifts in that
6 identification. And the shifts in the identification then
7 were more along the lines of Dean than what they were
8 earlier. So, yeah, the -- when you have identification and
9 two years later the identification is different than what it
10 originally was, then that starts to raise question marks.

11 **Q.** So when you say "shifts in identification," can you be
12 more specific about what you mean in terms of this case?

13 **A.** Yeah. So in this case, my recollection -- and you'll
14 have to excuse me. This is over 30 years ago. But my
15 recollection in this case is that originally the person in
16 the composite that they had identified had Dean in
17 particular -- it had the person that they believed did it
18 had a light brown or orangish-brown or kind of a blondish
19 kind of hair. Dean had dark hair, and there was no doubt
20 about that.

21 Also, the person that was originally described as doing
22 it was described as being very tan, and Dean, as you can
23 tell right now, is not a very tan person. And, in fact, my
24 understanding is -- and I saw it personally when he would be
25 in the sun -- he would burn very easily and never had a tan.

1 Those were only two of the differences. By the end of
2 the case, I think I had identified, if my recollection is
3 correct, about 55 differences, some more minor, some more
4 substantial, between the person who these women originally
5 identified and the person that they then identified at
6 trial. And so that's what I mean.

7 **Q.** Understood. Thank you.

8 So once you took on the -- agreed to take on the case,
9 did you receive what's called discovery from the prosecution?

10 **A.** Yes, I did.

11 **Q.** Can you tell the jury what discovery is?

12 **A.** So discovery in criminal cases, in state criminal cases
13 at the time, was governed by Ohio Rule of Criminal Procedure
14 16. And, of course, also by *Brady versus Maryland*, which is
15 a Supreme Court case, and other constitutional
16 considerations.

17 Discovery is supposed to be where the state provides
18 you with the evidence that they have that is against your
19 client, as well as evidence that they have which may be
20 favorable to your client. And that's called the *Brady*
21 *versus Maryland* evidence that you are entitled to have.

22 If you stop to think about it, it makes sense, because
23 it's the State that has done the investigation. It's the
24 law enforcement that has done all of this. And so by the
25 time defense lawyers get it, the charges are usually --

1 already have been filed. And so we need their investigation
2 to be able to conduct our own. So that's called discovery.

3 Q. And so did you also file a motion specifically requesting
4 the whole file?

5 A. I did. I did, yes.

6 Q. And did you also file what's called a Brady motion
7 requesting those materials as well?

8 A. I did.

9 Q. Was it your expectation that when you received discovery,
10 that it would be a complete set of everything that was known
11 to the police?

12 A. Yes. When -- when you deal in our judicial system, you
13 have to rely upon each other to provide the type of
14 information that you should have in order to try the case.
15 So, yes, I -- I had expected that I would receive the full
16 file.

17 Q. Okay. Fast forwarding, when was the first time that the
18 court convened to try Dean Gillispie, approximately?

19 A. I know the year. I can't tell you the date. I think
20 it was 1990 or 1991.

21 Q. Understood. Would February of 1991 sound right?

22 A. That sounds correct, yeah.

23 Q. And at trial, did the prosecution put on evidence about
24 how Dean came to be a suspect in the case?

25 A. They did. They -- they had put on evidence that a man

1 by the name of Mr. Wolfe, I think it was, had been a
2 supervisor of Dean's at General Motors, and had brought to
3 the attention of Detective Moore a picture of Dean, as well
4 as a picture of some other individuals at General Motors,
5 and had suggested to General Moore -- I'm sorry -- to
6 Detective Moore that Dean was one that met, in his opinion,
7 the composite and was probably the one that was involved in
8 this offense.

9 Q. Was there any evidence put on at trial to suggest that
10 Mr. Wolfe had made a first attempt at getting charges with
11 Detective Fritz and Detective Bailey?

12 A. No.

13 Q. Okay. And was that information that had been supplied to
14 you at the time at all?

15 A. No.

16 Q. And turning to the victims' testimony, did all three
17 victims testify?

18 A. Yes.

19 Q. And did they identify Dean in court?

20 A. They did.

21 Q. Okay. And that's a particular type of identification,
22 where they point to the person, you know, what we are familiar
23 with from the TV and movies, correct?

24 A. Yes.

25 Q. Did they -- did they testify as to how confident they

1 were when they made that particular type of identification?

2 A. My recollection is that they were highly confident that
3 he was the -- the individual.

4 Q. Did they also separately testify about making a pretrial
5 identification using the photo arrays?

6 A. Yes, they did.

7 Q. And what do you recall of that testimony?

8 A. My recollection of that testimony is that once again
9 they were shown a photo spread which had Dean's picture in
10 it, and that all three of them selected Dean out of the
11 photo spread.

12 Q. And Detective Moore, did he testify about the pretrial
13 identifications, as well?

14 A. I believe he did, yes.

15 Q. Okay. And was his testimony confirmative of what the
16 victims had said?

17 A. Yes.

18 Q. Okay. Now, after the prosecution puts on its case, you
19 have the opportunity to put on your own case, correct?

20 A. Yes.

21 Q. Okay. And when you put on your case, did you offer
22 evidence about the fact that Dean had no criminal record?

23 A. Yes.

24 Q. Okay. And why did you put on that evidence?

25 A. Well, I put on that evidence because we were making an

1 argument that the person who we believed may have been
2 involved in these crimes was more sophisticated and also
3 would have had some experience because of some of the things
4 that he may have done during the course of conduct that
5 would suggest that he had done it before.

6 Q. Was there -- was there any evidence to suggest that this
7 perpetrator was already familiar with DNA evidence?

8 A. Yeah, there was some evidence to suggest that he was
9 familiar either with DNA evidence or other scientific
10 evidence. He had asked one of -- one of the victims to spit
11 out -- I believe it was -- the semen so that it could not
12 then be traced to him.

13 Q. And you were a criminal practitioner at the time. Was --
14 this is the late '80s. Was the world on notice in general
15 about DNA evidence or was that just developing?

16 A. It was just developing, but certainly there was a lot
17 of noise about it.

18 Q. In your profession?

19 A. Yes.

20 Q. And what about in the general lay world?

21 A. In the general lay world, I really can't tell you
22 specifically. My recollection is that it was starting to
23 develop, and that while it developed in our world, it also
24 was developing in the general lay world as this new way of
25 defining certainty. And so DNA was certainly -- certainly

1 starting to become a thing.

2 **Q.** Now, in addition, did you bring out any contradictions at
3 trial between Dean's appearance and the victims' initial
4 descriptions at the times of the events in question?

5 **A.** Yes, I did. You know, I want to say the number 55
6 sticks in my mind, and I think it was because that was the
7 number of differences that I had brought out not just in the
8 description but in things that would have been more evident
9 if Dean had been the one that had committed this offense,
10 some of the things they would have seen on him that they --
11 that they didn't identify. And I think there was about 55
12 different things. Now, you know, they weren't all
13 significant, some might have been minor, but they all added
14 up.

15 **Q.** For example, is hair color one of the topics you went
16 into?

17 **A.** Yeah, hair color was a big thing, because they, you
18 know -- so you have these three victims who have a gun
19 pointed at them, and you don't expect them to have great
20 detail on the appearance of the person because their
21 attention's going to be on that gun.

22 That said, one of the things that they are going to
23 see, and because of -- because of the type of offense that
24 it was, hair style's going to stick out. And all three of
25 the victims had a much lighter-color hair style that they

1 originally identified than what Dean had. Dean had dark
2 hair and was starting to prematurely gray on the sides of
3 his hair.

4 Q. So you brought out hair color. Did you also bring out
5 the fact that no one identified the gray hair?

6 A. Yes. No one had identified any type of gray hair on
7 the -- on Dean or on anybody else.

8 Q. When they gave the description of the perpetrator at the
9 time of the incident?

10 A. There was no identification of gray hair on their
11 descriptions.

12 Q. You mentioned tanning already. We don't need to go back
13 over it, but is that also something that you brought out at
14 trial?

15 A. Yes, yes.

16 Q. What about Dean's chest hair, was that a topic that came
17 out?

18 A. It was. Dean had a lot of chest hair, and these
19 were -- this was in August. And assuming that there would
20 have been the ability to look at the individual who was
21 committing these offenses, his abundance of chest hair would
22 have stuck out, and nobody -- nobody said anything about
23 that.

24 Q. Did you also bring out anything about smoking --

25 A. Yes.

1 Q. -- cigarettes?

2 A. So Dean did not smoke, and the individual who committed
3 these offenses did, and had actually -- if I believe I'm
4 correct on my recollection -- had actually asked one of the
5 victims for a cigarette. And so they -- they did testify
6 that the person was a smoker. Dean was not a smoker.

7 Q. Was there also evidence that he had stolen cigarettes
8 from the victims?

9 A. Yes, yes, there was.

10 Q. And did you -- did you talk about differences in how the
11 perpetrator was dressed and how Dean dresses?

12 A. Yes. There were differences, if I recall, and I can't
13 go into them specifically because I just don't remember, but
14 there were differences in the dress that was brought out,
15 also.

16 Q. Okay. Switching topics, did you also offer evidence of
17 problems with the photo array that was presented to the
18 victims pretrial?

19 A. I did, yes.

20 Q. Can you summarize what that evidence was?

21 A. When you show a photo spread to a victim in a case, you
22 want to make sure that you do it in the -- in the best way
23 possible so that you are not being suggestive in how it's
24 done.

25 And in the photo array in this case, one of the

1 problems that I had noticed with it in my mind was the fact
2 that Dean's face was bigger than anybody else's and that it
3 was kind of, use the term "blown-up," so that it was a
4 closer look at Dean than some of the other individuals.

5 Also, a photo spread is supposed to be done --

6 MR. McLANDRICH: Objection, Your Honor. The jury
7 can see the photo spread for themselves and make whatever
8 observations they make. His observations are no better, no
9 worse than theirs.

10 THE COURT: Well, I think the question was whether
11 or not -- what his observations were or what his thoughts were
12 at the time. I'm going to allow it.

13 Overruled.

14 THE WITNESS: In addition, you're supposed to
15 have -- and today it's codified as law in the State of Ohio --
16 back then --

17 MR. McLANDRICH: Objection, Your Honor.

18 THE WITNESS: -- best practices --

19 THE COURT: As to law, sustained.

20 THE WITNESS: Okay.

21 THE COURT: We won't go into the law.

22 THE WITNESS: So best practices and back then --

23 MR. McLANDRICH: Objection, Your Honor. He's
24 testified to what, police best practices?

25 THE COURT: I didn't hear him say that. Rephrase

1 your question.

2 MR. KANOVITZ: Sure.

3 BY MR. KANOVITZ:

4 Q. So we've been talking about evidence that you brought up
5 at the criminal trial regarding what you challenged as
6 problems with the photo array, correct?

7 A. Yes.

8 Q. Okay. And one thing you mentioned was the size of the
9 head?

10 A. Yeah, one was the size of the head. The other
11 challenges that I made relating to it was that it was
12 Detective Moore who had shown the photos to the individual
13 victims instead of a third party who didn't know anything
14 about the case. And that way if Detective Moore was doing
15 it, there is an opportunity for it to be more suggestive.

16 One of the other things then was the fact that, of the
17 six, two of them were police officers within Miami Township
18 who were dressed in suits and ties, and none of the other
19 people there were.

20 Q. Was there any -- did you raise any evidence about
21 differences in the backgrounds of the picture?

22 A. Yes. And certainly if the jury has it they can see
23 that themselves, but Dean's background was different than
24 anybody else's.

25 Q. And did you also call an eyewitness identification expert

1 to present evidence about the topics that you just told the
2 jury about?

3 A. I did, yes.

4 Q. Can you tell the jury a little about that, please?

5 A. So an identification expert was -- was chosen by me to
6 testify to the jury about --

7 MR. McLANDRICH: Objection.

8 THE COURT: Overruled so far.

9 THE WITNESS: About identification in general and
10 about some of the issues that you can have when dealing with
11 identification -- time from the event until the actual
12 identification, any other things that might be suggestive and
13 taint that identification.

14 BY MR. KANOVITZ:

15 Q. And did the expert make clear that that, in that era, so
16 late '80s, early '90s, that it was understood that you
17 shouldn't be doing things to single out a suspect?

18 A. Yes.

19 Q. All right. At any point in time prior to trial, had you
20 come to learn that Detective Moore had told the victims that
21 Dean had died his hair?

22 A. Yes. I did discover that, and I had learned it
23 actually from one of the victims, I think in their
24 testimony.

25 Q. So that fact came out through one of the victims, not

1 through Detective Moore, correct?

2 A. Yes.

3 Q. And did you bring that fact out at trial?

4 A. I did.

5 Q. And switching topic slightly, did you also put on
6 evidence that Dean was with other people at the time that
7 these rapes occurred?

8 A. I did, yes.

9 Q. And can you explain, please.

10 A. Yes. So there were two -- three victims but two -- two
11 events at two different times. One was, I believe, August
12 5th, and the other one was August 20th. And on August 5th,
13 if my recollection is correct, we put on the evidence of
14 Dean being with some of his friends driving around during
15 the course of the time when the victim on August 5th would
16 have been experiencing what they experienced.

17 And then on August 20th, we put on evidence that Dean
18 was at a park in the state of Kentucky. Again, with some
19 friends. A park that he would go to during the course of
20 that summer several times. And on this particular day, was
21 at that park.

22 Q. Did Detective Moore testify at the trial in a way that
23 suggested that it would be -- that it would undermine Dean's
24 claim of having been in Kentucky on 8-20?

25 A. Yes.

1 Q. Can you explain, please?

2 A. So when you go to this particular park they went to,
3 you had to sign in on a little card, and so my recollection
4 is that Detective Moore had testified that he went down and
5 to look for cards. There were cards found for several
6 months before August 20th, but there were no cards found for
7 August 20th.

8 Q. And that's the testimony that he gave at the criminal
9 trial, correct?

10 A. Yes.

11 Q. And by the way, did you have copies of the grand jury
12 testimony when you defended this case?

13 A. No, I did not.

14 Q. And is it -- is it -- is that common or uncommon for
15 criminal defense lawyers to have the grand jury testimony?

16 A. It is uncommon for criminal defense lawyers to have
17 grand jury testimony.

18 Q. Why is that?

19 A. Because the law doesn't provide for us to have that.
20 They are considered secret. And you have to be able to
21 articulate a particular need for that and a particularized
22 reason why you should get it.

23 Q. And did you have any information that would have allowed
24 you to satisfy that standard in this case at the time that you
25 defended the case?

1 A. Not at that time, no.

2 Q. Okay. And in general, are sexual assault cases with a
3 victim ID difficult to defend?

4 A. Yes.

5 Q. Did you feel that you had enough evidence given
6 everything you just testified to to make this a defensible
7 case?

8 A. I did, yes.

9 Q. Why?

10 A. I did because the time lapse between the actual event
11 and the subsequent identifications; the differences in those
12 identifications, so that I would be able to argue to the
13 jury that these individuals actually began to formulate
14 their identification of Dean not based upon what they may
15 have actually seen but because of the lapse of time, the
16 need to have a conviction, perhaps whatever other suggestive
17 things I could argue at that trial that I believe was
18 improper; and that these defenses then should have been able
19 to put enough reasonable doubt in the minds of the jury for
20 them to have found him not guilty.

21 Q. Now, during the course of the trial, did the prosecution
22 communicate to you a plea bargain for Dean?

23 A. Yes.

24 Q. And what was that?

25 A. My recollection is that -- and I don't remember how we

1 would get there -- but my recollection is that they had
2 offered for Dean to do 30 days in jail.

3 Q. Okay. And did you communicate that offer to Dean?

4 A. I did.

5 Q. What happened?

6 A. Dean rejected the offer.

7 Q. Was that surprising to you?

8 A. Yes.

9 Q. Why?

10 A. Because Dean was looking at an enormous amount of time,
11 my recollection is over 50 years, if he was convicted.

12 Q. And fast forwarding a little bit, after Dean turned down
13 the offer, did the jury reach a verdict?

14 A. They did.

15 Q. And what was it?

16 A. Guilty.

17 Q. What was Dean's reaction when the verdict came down?

18 A. My recollection is that Dean was in shock, that he did
19 not know how they could come to such a verdict, and that he
20 was extremely disappointed and sad.

21 Q. Was his family in the courtroom when the verdict came
22 down?

23 A. They were.

24 Q. Was he able to talk to them after the verdict?

25 A. Not at that time. They immediately put him in

1 handcuffs and took him to Montgomery County Jail.

2 Q. Did you have the opportunity to come see him in
3 Montgomery County Jail after the first conviction?

4 A. I did.

5 Q. Can you tell the jury how Dean was doing?

6 A. Dean was not doing well. Jail -- jail is not a good
7 place to be, and he was not doing well. He -- he did not
8 know how it was that he got there, why he was there. He was
9 usually, pretrial and during the course of the trial, a guy
10 that was always smiling, a guy that was always very polite
11 and seemed to be very happy, and that was not the Dean I saw
12 in jail.

13 Q. Now, Dean had been out on bond for most of the time
14 following his arrest up until the first trial, correct?

15 A. Yes.

16 Q. Was a bond set for him following the second trial --
17 following the first trial?

18 A. It was. So Dean had been out, if my memory serves, on
19 a \$50,000/10 percent bond before the first trial. And what
20 that is, that means that after the trial is over, whoever
21 posted the bond can go to the clerk of courts and they can
22 get the bond back, less 10 percent of it. So if they gave
23 the Court \$5,000, they could get back \$4,500.

24 After the conviction in the first trial, the judge
25 eliminated the 10 percent portion of that, so that now

1 whoever posted the \$5,000, you had to go to a bondsman and
2 you had to pay that bondsman. And usually paying the
3 bondsman would consist of \$5,000, which you would not get
4 back. The bondsman would then post the bond. So it made a
5 big difference to this family. They were not able to afford
6 to do that.

7 Q. And following the first conviction, did there fairly
8 quickly come information to you that suggested that there
9 should be -- the conviction should be vacated and a new trial
10 had?

11 A. Yes.

12 Q. And what was that evidence?

13 A. It came to my attention that the state had several
14 pubic hairs and head air that was combed off of the victims'
15 sweaters that they were wearing, or clothing -- sweaters
16 might not be correct -- clothing that they were wearing
17 during these events, and that that hair was found at the
18 Miami Valley Laboratory and had never been produced in
19 discovery to me. And, in fact, the state had never had them
20 examined either.

21 Q. After you found out that that hair evidence existed, did
22 you communicate that to Dean?

23 A. I did, yes.

24 Q. And what did he want to do?

25 A. Dean wanted me to apply for a new trial, which I did.

1 Q. Did you have to get permission to take hair samples from
2 Dean?

3 A. I did, yes.

4 Q. And Dean -- and Dean wanted the hair samples?

5 A. Yes. Knowing -- yeah, Dean wanted the hair samples.

6 Q. Okay. And I take it at the time that -- at the time, he
7 hadn't been sentenced yet, correct?

8 A. Correct.

9 Q. And at the time, he also had appeals that were available
10 to him?

11 A. Correct.

12 Q. If the hair sample had gone bad for him, how would it
13 have affected those remaining procedures?

14 A. If the hair samples had gone bad for him, by that,
15 meaning had the experts that examined them found that they
16 matched his hair, then we would not have been able to get a
17 new trial and it would have -- it would have devastated --
18 been a devastating impact on the case.

19 Q. In terms of the appeals and the sentencing?

20 A. Yes.

21 Q. And Dean was aware of that?

22 A. Yes.

23 Q. And he -- and he wanted to do the hair sampling anyway,
24 correct?

25 A. Yes.

1 Q. Okay. And what were the results of the hair sampling?

2 A. The results of the hair samplings is that none of them
3 matched Dean, nor did they match the victims in the case.
4 So they came from a third party.

5 Q. Well, just to be clear, some of the -- none of the hairs
6 matched Dean, correct?

7 A. Correct.

8 Q. And isn't it true that some of the hairs matched the
9 women but other hairs on there did not?

10 A. Some of the head hairs matched the women, but not the
11 pubic hairs.

12 Q. Well, I think you might have it -- well, isn't it true
13 that some of the head hairs were a light brown color?

14 A. Yes.

15 Q. And those did not match Dean?

16 A. That's true too.

17 Q. And you are not a -- you are not a scientist, but what is
18 your understanding of what the scientists do in a hair match?
19 Is it, do they just look at color, or do they look at other
20 factors?

21 A. No, they -- they look at other factors. Today they can
22 do DNA on it, but they look at -- back then, I don't recall
23 that they did DNA. I think it was more where they do a
24 microscopic examination of the hair follicles themselves to
25 determine whether there is any matches, as well as color.

1 Color is always a significant factor. They look to see
2 whether there had been any dye or anything of that nature
3 involved in the hair.

4 Q. And was dye found?

5 A. No.

6 Q. And so armed with that evidence, did you -- were you able
7 to get a second trial?

8 A. Yes.

9 Q. And approximately when did that second trial take place?

10 A. Three or four months later, I think.

11 Q. In terms of the testimony that we've already discussed,
12 was there any substantial difference between the first trial
13 and the second trial?

14 A. There were -- you know, we had made some efforts to
15 work more on the area of where he was, to try to come up
16 with some better evidence as to where he might have been
17 during the course of this. But I don't recall anything
18 substantially different.

19 Because I had lost the first trial for Dean, I did ask
20 that my law partner, Lou Hoffmann, join me in the second
21 trial so that I could double check my work and that Lou
22 could examine the victims in the case in a manner different
23 than my style so that maybe that would be helpful too.

24 Q. But in terms of the substance, though, the victims gave
25 essentially the same accounts, correct?

1 A. Yes.

2 Q. And Detective Moore gave essentially the same accounts?

3 A. Yes.

4 Q. And then the people who had testified that Dean was with
5 them at the time of the events in question, they gave the same
6 accounts?

7 A. Yes.

8 Q. Okay. Were there also two additional witnesses who knew
9 Dean from the lake called?

10 A. Yes, yes. They were witnesses that, if my recollection
11 is correct, which had actually been at the lake and had, I
12 think, served Dean lunch or something of that nature and
13 knew Dean because of his frequency down there.

14 Q. So they were waitresses, correct?

15 A. Yes.

16 Q. And then the hair evidence was offered, correct?

17 A. Yes.

18 Q. How did you get the hair evidence before the jury?

19 A. I called the experts that did the examination, and they
20 testified to the jury that the hair did not match Dean's.
21 And while some of it matched the victims, that the -- there
22 was also hair on there that matched neither the victim nor
23 Dean's.

24 Q. And did you also hire a private expert to come in for
25 Dean specifically that didn't work for the state to discuss

1 the evidence?

2 A. I did. Not necessarily to discuss the evidence. I
3 hired Area Wide, but as I mentioned, Dean's family didn't
4 have much money.

5 Q. Let's talk about the experts for now.

6 A. Okay.

7 Q. We will get to that.

8 A. I'm sorry. The experts. I thought -- I apologize.

9 Q. So a hair microscopist --

10 A. Yes.

11 Q. -- if that's how you say that word -- expert, you hired
12 one of those?

13 A. Yes.

14 Q. Was that expensive?

15 A. Yeah. My recollection is that generally an expert
16 along those lines costs several thousand dollars.

17 Q. I forgot to ask you about the eyewitness identification
18 expert. Was that expert expensive?

19 A. That expert again would have been several thousand
20 dollars.

21 Q. And how long did the jury deliberate in the second trial?

22 A. My recollection is that they deliberated a very long
23 time. Would have been days, I think, as opposed to hours.
24 And finally came back at one point in time after several
25 days and had indicated to the judge that they were hung,

1 eight for acquittal, four for conviction.

2 Q. And did you see, personally see a note that they sent to
3 the judge?

4 A. Yes.

5 Q. And that's how you had that information?

6 A. Yes.

7 Q. And did you communicate that information to Dean?

8 A. I did.

9 Q. What did the Court do following the note about being hung
10 8-4?

11 A. The Court gave what was commonly known back then as a
12 dynamite instruction. And --

13 MR. McLANDRICH: Objection, Your Honor. To the
14 colloquialism of the instruction.

15 THE COURT: Do you have another term, Mr. Lieberman?

16 THE WITNESS: Your Honor, that's what I have always
17 called it. It's --

18 THE COURT: Can you --

19 THE WITNESS: I can describe it if --

20 THE COURT: Describe it.

21 THE WITNESS: So it's an instruction given by the
22 judge when you have a hung jury. And what the judge does is
23 tells the jury, hey, we're not -- we're never going to get a
24 better jury than you are. We need you to go back and work
25 hard, listen to each other. Go back in with an open mind and

1 come back with a verdict because we really need you to do that
2 if it's at all possible.

3 I'm paraphrasing, but that's -- that's the essence of it.

4 BY MR. KANOVITZ:

5 Q. So is it fair to say that following these days of
6 deliberation and the jury wanting to declare themselves hung,
7 the judge said go back and keep deliberating?

8 A. Yes.

9 Q. And how was Dean feeling about how the trial went while
10 the jury was deliberating?

11 A. I think Dean felt that the trial was going well, that
12 he would be released from jail and he'd be going home.

13 Q. After the jury got that instruction about hung juries,
14 what happened next?

15 A. They went back, they deliberated, and then several
16 hours later they came back with a conviction.

17 Q. Describe Dean's reaction, please.

18 A. Again, shock. I would say he was horrified at the
19 prospect of having to stay in jail; that he was extremely
20 despondent and was crying.

21 Q. Had you seen him cry before?

22 A. I saw him cry in jail after the first verdict.

23 Q. Prior to -- prior to the --

24 A. No, no.

25 Q. Now, when there's a conviction, does the judge

1 immediately sentence the defendant?

2 **A.** No. When there is a conviction, in state court they do
3 what's called a presentence investigation report, where the
4 probation department will go over and talk to the defendant,
5 talk to his family and get background to the judge and then
6 make a recommendation on sentencing.

7 **Q.** Now, as a defense lawyer, is it -- is it usually the case
8 that if a defendant expresses remorse at sentencing, that
9 that's helpful to them?

10 **A.** It's very helpful. One of the things that you do as a
11 defence lawyer is if your client enters a plea of guilty or
12 is found guilty at trial, that you -- you try to emphasize
13 the remorse that they feel for doing what it was that they
14 were convicted of.

15 I didn't have that in this case because Dean continued
16 to deny that he did it.

17 **Q.** Assert his innocence?

18 **A.** Yes.

19 **Q.** And so what was your strategy given that Dean continued
20 to assert his innocence?

21 **A.** I could only do what we had left, and that was that
22 Dean came from a good family, that his record was clean,
23 that he was certainly a hard-working individual, and that
24 in -- that he was not going to admit to doing something that
25 he did not do, and that's why he could not express remorse.

1 Q. Did you explain to Dean the potential consequences in
2 terms of sentencing of his maintaining his innocence?

3 A. Yeah, I did.

4 Q. And he wanted to maintain his innocence regardless?

5 A. He did.

6 Q. After the judge heard the sentencing evidence that you
7 put on, what was the sentence?

8 A. I don't remember the numbers, to be honest with you.
9 It's something that I prefer to put out of my mind, I guess.
10 It was a very long sentence.

11 Q. In terms of the range of what a judge could do, was it at
12 the high end, the middle, or the low end?

13 A. It was at the high end.

14 Q. And was it more than -- potentially, more than five
15 decades?

16 A. Yeah.

17 Q. Okay, sir. Switching topics, I'd like to talk to you
18 about some categories of evidence and understand if this -- if
19 you had information along these lines when you were defending
20 Dean, okay?

21 A. Okay.

22 Q. First category -- we touched on this already -- was there
23 ever any evidence given to you that Mr. Wolfe had approached
24 Detective Fritz and Detective Bailey about getting charges
25 against Dean before he ever had a conversation with Moore?

1 A. No.

2 Q. And did it -- along the same lines, were you ever told
3 that Detective Fritz and Detective Bailey had excluded Dean as
4 a suspect?

5 A. No.

6 Q. Would a fact like that have been helpful to you in
7 defending the case?

8 A. Yes, absolutely.

9 Q. Can you explain why, please?

10 A. Well, I probably would have put Detective Bailey and
11 Detective Fritz on the stand to testify why it was that they
12 excluded Dean and why they did not give that tip any
13 credence.

14 Q. Could that information have been used to impeach
15 witnesses that the prosecution put on?

16 A. Yes.

17 Q. Could it have been used to impeach Mr. Wolfe?

18 A. Yes.

19 Q. Could it have been used to impeach Mr. Moore?

20 A. Yes.

21 Q. And was Mr. -- Detective Moore's credibility and the
22 believability of his testimony important to this trial?

23 A. It was. So we had -- we had three identification
24 witnesses with no supporting physical evidence to support
25 their testimony. That means that Detective Moore's

1 testimony now became more important than what it usually
2 would for a detective.

3 Q. Did you receive any information that Detective Fritz had
4 written reports and that Detective Bailey had written reports
5 about why Dean was excluded as a suspect?

6 A. At what time?

7 Q. Prior to the first trial.

8 A. No.

9 Q. Okay. And actually, at any time while you were actually
10 defending the case, did you get information along those lines?

11 A. No.

12 Q. Okay. So I take it from your testimony that, fast
13 forwarding years later, you did receive information along
14 those lines?

15 A. Yes, after the Innocence Project became involved.

16 Q. Okay. We'll get there then.

17 If you had had these reports, would those have been
18 admissible at trial?

19 A. I think they would have been usable. There may have
20 been some objections to their admissibility as such, but I
21 think those are things that we -- we could have gotten
22 around and certainly at least use them for impeachment
23 purposes.

24 Q. Okay. And we are using the term "impeachment." Can you
25 just tell the jury what impeachment entails?

1 **A.** Impeachment is a device where as an attorney you are
2 examining a witness and you are saying to that witness that
3 what they are testifying to today is different or
4 inconsistent with what they testified to earlier. That's
5 called impeachment.

6 **Q.** If the reports had contained information about the
7 eyewitnesses remembering a pants size that was too small for
8 Dean, is that information that you could have used in his
9 defense?

10 **A.** Oh, yes, absolutely.

11 **Q.** How could you have done that?

12 **A.** Well, you would have been able to bring that out
13 through the witnesses at trial, that they originally had
14 identified a pants size and what that pants size was, and
15 then I would have produced Dean's pants size, which,
16 frankly, would have been significantly larger.

17 **Q.** He was heavyset --

18 **A.** Yes.

19 **Q.** -- at all times, okay.

20 And what was the name of the prosecutor who prosecuted
21 Dean?

22 **A.** Mr. Folfas.

23 **Q.** And did you ever have a conversation with Mr. Folfas
24 where you said to him, "I'd like to see the reports that Fritz
25 and Bailey wrote excluding Dean"?

1 **A.** No, not -- I certainly don't recall any -- anything
2 like that during the course of these two trials. No,
3 nothing like that.

4 **Q.** And, similarly, did he ever have a conversation with you
5 where he said to you, "Yeah, I understand that Fritz and
6 Bailey had excluded Dean"?

7 **A.** No.

8 **Q.** All right. Next area. Were you ever provided
9 information that one of the victims recalled seeing arm
10 tattoos on the perpetrator?

11 **A.** I -- I don't recall ever seeing that.

12 **Q.** Okay. Is that a piece of information that you could have
13 used in Dean's defense?

14 **A.** Yes, yeah, absolutely.

15 **Q.** Please explain.

16 **A.** Well, Dean doesn't have tattoos and didn't have
17 tattoos, and my recollection of the science back then is if
18 you had tattoos, removing them would have been a very
19 painful process if -- if available at all.

20 So, yeah, I would have had Dean show his arms where he
21 has no tattoos.

22 **Q.** And you could also have called witnesses who knew him and
23 knew --

24 **A.** Yes.

25 **Q.** -- his arms to testify they never saw a tattoo?

1 A. Right. I would have done that, yeah.

2 Q. Another piece of evidence, sir, when you were challenging
3 the photo arrays, you mentioned that two of the people in the
4 photo arrays were actually detectives that worked at the Miami
5 Township Police Department.

6 A. Yes.

7 Q. Was it ever disclosed to you that one or more of those
8 detectives was on duty at the time that one or more of the
9 victims viewed the photo array?

10 A. No, not to my recollection.

11 Q. If that had been disclosed to you, would that have been a
12 fact you could have used in Dean's defense?

13 A. Absolutely.

14 Q. Could you explain why, please?

15 A. Well, if one of the victims is going into the police
16 station and sees a police officer and knows that he's a
17 police officer that works there and then subsequently sees
18 him in the photo spread, they are going to eliminate that
19 person as the potential person who committed the crime. And
20 so that now reduces your array to maybe four people that you
21 are choosing it from.

22 Q. Turning to the issue of the August 20 event, did you ever
23 receive information that Detective Moore obtained camping
24 receipts for the month of August?

25 A. For the month of August, no.

1 Q. Okay. If you had received that information, could you
2 have used that in Dean's defense?

3 A. Absolutely, yeah.

4 Q. Please explain.

5 A. Well, Dean had said that we -- he was in this
6 campgrounds in Kentucky on that particular date. And, you
7 know, we sent an investigator down there to try to get some
8 evidence that he was down there. That's how, you know, we
9 were able to get ahold of the waitresses.

10 But the cards would have been significant because it
11 would have identified either Dean or his automobile as
12 being -- as being there on that day. They were there for
13 the months prior to that, there were times when he had gone
14 down there.

15 Q. So -- so did Detective Moore testify at trial that he had
16 cards for the previous months but not cards for August?

17 A. Yes.

18 Q. And if, in fact, you had information that he did receive
19 cards for August, could you have used that to impeach him?

20 A. Yes.

21 Q. And would that have been important to the trial?

22 A. Oh, yes, extremely important, in my mind.

23 Q. And if you had, in fact, received the cards for August,
24 you could have used those, correct?

25 A. Yes.

1 Q. And did you ever receive information that Mr. Moore gave
2 false information at the grand jury?

3 A. Not during the course of the trial, because I didn't
4 have the grand jury testimony during the course of the
5 trial.

6 Q. At either trial, correct?

7 A. Correct.

8 Q. Okay. And if you had information that Detective Moore
9 had given false information to the grand jury, is that
10 something you could have used in Dean's defense?

11 A. Yes.

12 Q. Please explain.

13 A. Well, if he gave information again at the grand jury
14 which was inconsistent with what he said under oath during
15 his testimony at trial, then, again, you can use that grand
16 jury proceeding to impeach him because he would have been
17 under oath on both of those occasions. And if it would have
18 been something significant, then I think it would have made
19 a huge difference in the trial.

20 Q. Okay. Now, switching categories again, you testified
21 that the witnesses testified at trial about the process of
22 making identifications from the photo array, correct?

23 A. Yes.

24 Q. And Detective Moore also testified to that process?

25 A. Yes.

1 Q. At any point in time, was information disclosed to you
2 that the -- that the victim C.W. was not able to make an
3 identification when she was looking at the array?

4 A. That was never disclosed to me, no.

5 Q. And would that fact have been important in Dean's
6 defense?

7 A. Oh, yes, yes.

8 Q. Please explain why.

9 A. Well, if one of the witnesses cannot make an
10 identification right away or at all, then that information
11 should be given to the jury so that they can judge the
12 strength of that identification in light of everything else.

13 MR. KANOVITZ: Your Honor, at this time we'd like to
14 publish Plaintiff's 58, page 1 which has previously been shown
15 to the jury.

16 THE COURT: You may.

17 MR. KANOVITZ: Thank you.

18 (Exhibit displayed.)

19 BY MR. KANOVITZ:

20 Q. Okay, sir, showing you Plaintiff's 15 -- 58, page 1, is
21 this a document that you would have received in discovery?

22 A. It is something I should have received in discovery. I
23 don't recall whether I did or not.

24 Q. Okay. But in the course of defending eyewitness cases,
25 did you receive documents that talk about what's supposed to

1 be read to the eyewitnesses?

2 A. Yes.

3 Q. And showing you down here at the bottom, do you see the
4 sentence that says, "If a witness cannot make an
5 identification, he may then be read the following?"

6 A. Yes.

7 Q. And if you -- if it had been disclosed to you that
8 Detective Moore had to read that sentence to C.W. before she
9 was willing to point anyone out, would that have been useful
10 information for Dean's defense?

11 A. Yes.

12 Q. Explain, please.

13 A. Well, if -- if they had to read that information, then,
14 again, that's something you point out to the jury, that
15 there was not an immediate identification without that
16 paragraph having to have been read. And then once that
17 paragraph is read, there becomes an identification, and it
18 again adds another argument to the identification that the
19 identification is not a strong one.

20 Q. So in terms of cases that involve eyewitness
21 identification and the prosecution having to prove guilt
22 beyond a reasonable doubt, is there an important difference
23 between saying someone is the perpetrator and someone
24 resembles the perpetrator?

25 A. You know, I don't know that there is a significant

1 difference there. If they resemble the perpetrator, then
2 you're pretty much saying they are the perpetrator.

3 Q. Let me say something a little different. If the witness
4 doesn't positively identify but is willing to say, yeah, there
5 is a resemblance, that's a significant difference, correct?

6 A. Yeah, yeah. If it's not a positive identification and
7 they are saying, well, yeah, there is a resemblance, yeah,
8 yes, because there is room for doubt on that.

9 Q. Thank you. So taking all of the facts that I just went
10 over with you that you did not have as a whole, what is your
11 assessment of how that could have changed Dean's defense, the
12 totality of all of those facts?

13 A. My assessment is, based upon what I know today, is that
14 there would have been a significant --

15 MR. McLANDRICH: Objection, Your Honor.

16 THE COURT: Well, I -- I think the question is how
17 would it have affected his defense.

18 MR. McLANDRICH: I think he was asking him what the
19 odds of a different result were.

20 MR. KANOVITZ: I was asking his assessment of how it
21 would have affected his defense. If he had -- being able to
22 use all of those facts in their totality.

23 THE COURT: So let me ask you this, Counsel: Are
24 you asking him how it would affect his presentation of the
25 case?

1 MR. KANOVITZ: It will be a two-part question.
2 That's the first part.

3 THE COURT: I will let him answer that one.

4 BY MR. KANOVITZ:

5 Q. Okay.

6 A. So knowing what I know today and giving -- given some
7 of these things that were not disclosed at the time, I would
8 have certainly put those on in front of a jury. I would
9 have put on -- if I had park records, I would have put on
10 those park records; if I had known that Wolfe had gone to
11 Bailey and Fritz, the detectives, early on, and that they
12 said, no, we're eliminating Gillispie for these reasons, I
13 would have put that on. I would have put that testimony on.

14 I would have put on any of the other of the matters
15 that we've discussed today that I may not have known about
16 because in identification testimony, when that's all you
17 have on the State side, on the defense said you want to put
18 anything that you can on which is going to lessen the
19 strength of that identification testimony. So, yeah, I
20 would have put all of this on.

21 Q. So, obviously, none of us could say what effect that
22 would have had on the jurors one way or the other, but in
23 terms of your assessment, would that have made it a
24 substantially stronger case from the defense side?

25 A. Yes, I think it would have made it a substantially

1 stronger case.

2 Q. Switching topics, sir, I want to talk about the resources
3 that the family had available to defend the case with, okay?

4 A. Yes.

5 Q. How much was your fee?

6 A. I honestly don't remember.

7 Q. Were you able to charge your usual and customary fee or
8 did you have to cut it?

9 A. No. I -- I did not charge what I would normally charge
10 for a rape case, I remember that. I remember that because I
11 asked Lou Hoffmann to come on and help me in the second
12 case, that I did not charge an additional fee for myself in
13 the second case.

14 Q. Got it. So you basically -- all the work you did in the
15 second case you didn't charge for, and then Lou charged for
16 his time?

17 A. Yes.

18 Q. And in addition to the lawyer's fees, was there other
19 money that had to be spent on the defense?

20 A. Yes. There were the experts that we talked about and
21 other miscellaneous things. The investigator, although very
22 limited, we had to pay him for what he did.

23 Q. And overall, how would you describe the family's wealth
24 that was available to pay for the defense?

25 A. They did not have resources available to pay for very

1 much.

2 Q. Do you recall if you filed a motion regarding the
3 family's indigency or Dean's indigency?

4 A. I do remember that. And I think it was after the first
5 trial in which he was convicted. I wanted a transcript of
6 that trial where you have to pay a court reporter in order
7 to get that transcript. So I filed with the court what's
8 called a motion of indigency saying that, you know, Dean
9 doesn't have any money and we desperately need that
10 transcript in order to try the second case.

11 Q. You mentioned spending some money for a private
12 investigator?

13 A. Yes.

14 Q. Approximately how much money was available for that
15 service?

16 A. I don't remember the numbers. It wasn't very much.

17 Q. How did you -- how did you end up hiring a private
18 investigator?

19 A. My recollection is that I -- that it was the private
20 investigator who had on his own through some unrelated
21 matter found out about the hair --

22 Q. Let's just talk about hiring the private investigator.
23 Did you go through a service, did you go directly to a
24 particular person?

25 A. And that's kind of what --

1 Q. I'm sorry.

2 A. -- I'm explaining. That it was Area Wide, and they had
3 told me there was a rumor that there was a hair there. And
4 so I had hired them based upon that to try to figure out
5 whether a hair existed or not.

6 Q. I got it. And was Area Wide a service that lawyers in
7 Dayton commonly used?

8 A. Some did. This was my first time I had used them.

9 THE COURT: Counsel, we're going to have to break.

10 MR. KANOVITZ: We better break than move further
11 into this topic.

12 THE COURT: Ladies and gentlemen, we're going to
13 stand in recess for approximately 15 minutes. Please don't
14 discuss the case amongst yourselves or with anyone else.
15 Please don't formulate any opinions, draw any conclusions.

16 We'll stand in recess. Thank you.

17 THE COURTROOM DEPUTY: All rise. This court stands
18 in recess.

19 (Jury out at 10:14 a.m.)

20 (Recess at 10:15 a.m.)

21 (Jury in at 10:37 a.m.)

22 (In open court at 10:38 a.m.)

23 THE COURT: We are back on the record.

24 Mr. Lieberman, you are still under oath.

25 Counsel, you can proceed.

1 MR. KANOVITZ: Thank you, Your Honor.

2 BY MR. KANOVITZ:

3 Q. Sir, when we broke, we were talking about hiring a
4 private investigator and the resources that were available for
5 that. Do you recall?

6 A. Yes.

7 Q. And when you hire a private investigator when you are
8 defending a case, is it like in the movies where you just see
9 the private investigator go out and solve the case, or is it
10 something different?

11 A. No. Most of the time you have a limited budget, and so
12 when you hire a private investigator, you have specific
13 things that you want them to do for you. And you may not
14 even show them everything about the case. You know, I've
15 had private investigators serve people before because we
16 couldn't find them, things like that.

17 Q. When you say "serve," can you just explain to the jury
18 what you mean by that?

19 A. If we wanted a witness to come into trial, needed them
20 to be served with a subpoena and we couldn't find them, we'd
21 hire a private detective to do that.

22 Q. And you testified that you -- that after you got the call
23 about the hairs, you went ahead and used Area Wide?

24 A. Yes.

25 Q. Okay. And did you -- did Area Wide choose who to assign

1 to the tasks that you had or did you choose who to assign to
2 the tasks?

3 A. No. Area Wide did that.

4 Q. And who did Area Wide assign?

5 A. My recollection is that they assigned Fritz to -- as
6 one of the people, one of the private investigators.

7 Q. Okay. And when they assigned Fritz, is that someone that
8 you knew before?

9 A. Well, I have known him through previous cases having --
10 to have worked out at Miami Township.

11 Q. Did you have any kind of relationship with him?

12 A. No, not really.

13 Q. Okay. And when they assigned him, were you aware of his
14 involvement in excluding Dean?

15 A. No, no, not at all.

16 Q. And what specific assignments did you ask Mr. Fritz --
17 Detective -- well, former Detective Fritz at that point to
18 provide?

19 A. I really don't have a clear recollection on what it
20 was. I know there were some specific things. My -- I want
21 to say that most of it involved the discovery of the hair
22 and the impact of the hair and what that may have meant as
23 far as its impact on the case. So that was one thing that
24 comes to my mind. And then I think I had them go down to
25 the park in Kentucky to look for witnesses down there.

1 So it would have been around the alibi and around the
2 hairs.

3 **Q.** Okay. So that was basically the specific assignments
4 that you hired Area Wide to do?

5 **A.** Yeah. I don't recall anything else.

6 **Q.** Okay. And switching topics, in the course of defending
7 this case, do you remember learning about a man named Kevin
8 Cobb?

9 **A.** Yes, I do.

10 **Q.** What do you recall learning?

11 **A.** I remember -- I don't remember which trial it was, but
12 I remember that it was brought to my attention that there
13 was a man by the name of Kevin Cobb who was just charged
14 with rape and was a security officer at Lebanon prison, and
15 that he fit the description of the person from the
16 composite.

17 **Q.** Fit the physical description?

18 **A.** Yes.

19 **Q.** What about the descriptions of the person's hair color,
20 et cetera?

21 **A.** Yes, he fit all of that.

22 **Q.** And the tanning, did he fit that?

23 **A.** Yes. And I think if my recollection is correct, he was
24 biracial.

25 **Q.** And the combination of features of having both light-

1 colored hair and what the witnesses described, the victims
2 described as a very dark tan, was that an unusual combination
3 to encounter?

4 A. Yeah, I thought so.

5 Q. And then you said that he had been charged with a rape.
6 Is it possible that was just an attempt?

7 A. Yeah, that's possible. Yes.

8 Q. And do you recall the MO that he used when he was making
9 the attempt?

10 A. I don't have a real clear recollection of that. I do
11 know that what recollection I have is that it was similar to
12 the MO that was described by the victims.

13 Q. And were you able to make use of that information in
14 Dean's defense?

15 A. A little bit, but not very much. We didn't have -- we
16 didn't have enough information about it. We tried to get
17 into it. The judge limited us on what we could do as it
18 related to that. So while it was mentioned, it wasn't
19 mentioned in depth.

20 Q. Was there money to pay for investigators to investigate
21 Mr. Cobb?

22 A. No, not -- not enough, no.

23 Q. Switching topics, following the second conviction, did
24 your involvement in the case come to an end?

25 A. Yes.

1 Q. And was there -- did a time come where you were contacted
2 by the Ohio Innocence Project about this case?

3 A. Yes.

4 Q. Approximately when?

5 A. I want to say maybe around 2010, somewhere around in
6 there.

7 Q. Okay. So many, many years had passed since the
8 convictions?

9 A. Yes.

10 Q. And did they give you information that you did not know
11 when you were defending Dean?

12 A. Yes.

13 Q. What did they tell you?

14 A. They told me --

15 MR. McLANDRICH: Objection.

16 MS. FRICK: Objection.

17 THE COURT: Sustained.

18 BY MR. KANOVITZ:

19 Q. Did they -- was this the first time you had heard
20 anything about information that you did not know at the time
21 you defended Dean?

22 A. Yes.

23 Q. Okay. And was that information that had appeared in the
24 discovery packet at all?

25 A. Not that I became aware of through them.

1 Q. And after learning information from the OIP, what did you
2 do?

3 A. I agreed to do -- to sign a declaration or affidavit
4 saying that I did not know about that information during the
5 trial.

6 Q. Okay. And do you recall if it was one or two eventually?

7 A. I think there were two.

8 Q. Okay. And sitting here today, do you have any currently
9 existing relationship with Dean?

10 A. Only to say hello when I saw him coming into court this
11 morning.

12 Q. Okay. And you continue to practice law to this day,
13 correct?

14 A. Yes.

15 Q. Do you have any reason why you would -- why you would lie
16 on behalf of Dean?

17 A. No, no, I wouldn't do that.

18 MR. KANOVITZ: No further questions.

19 THE COURT: Thank you.

20 Counsel.

21 MR. McLANDRICH: Thank you, Your Honor.

22 **CROSS-EXAMINATION**

23 BY MR. McLANDRICH:

24 Q. Morning, Mr. Lieberman.

25 A. Good morning.

1 Q. My name's John McLandrich. I represent Detective Moore.

2 So you testified earlier with respect to this report that
3 was supposedly drafted by Detective Bailey that you didn't
4 know about. Do you recall that?

5 A. I recall my testimony, yes.

6 Q. Yes. You had no personal knowledge that such a report
7 exists, correct?

8 A. I have not seen that report.

9 Q. What you know about the existence of such a report is
10 something that's been told to you by others, correct?

11 A. Correct.

12 Q. And you have no basis on which to testify that Detective
13 Moore was ever in possession of such a report, correct?

14 A. I think that's incorrect.

15 Q. And is the basis for that something that someone told
16 you?

17 A. The basis is that I saw affidavits that were signed
18 under oath saying that he had had such a report.

19 Q. And that would be an affidavit of Mr. Fritz or
20 Mr. Bailey?

21 A. Yes.

22 Q. All right. And, in fact, it was your position and
23 opinion that Mr. Bailey lied during the first trial, correct?

24 A. Yes.

25 Q. And, in fact, Mr. Bailey was asked whether Mr. Gillispie

1 had been a suspect, and denied that, correct?

2 A. During the course of the trial?

3 Q. Yes, sir.

4 A. I don't remember, but that probably is something I
5 might have asked.

6 Q. Well, that was the thing that you believe he lied about
7 when he was -- Mr. Bailey was asked whether Mr. Gillispie had
8 been a suspect and he said no; and, in fact, that was the
9 thing that you believe he lied about, correct?

10 A. I just really don't remember.

11 Q. We can get to that then.

12 A. Okay.

13 Q. Do you recall testifying at a hearing on behalf of
14 Mr. Gillispie. When you were asked about whether you thought
15 Mr. Bailey had deceived you and the jury at the criminal
16 trial, and you testified, I believe your words were, "His
17 explanation was a bunch of baloney." Do you recall that?

18 A. I do not recall those exact words. I did testify at a
19 hearing where I was subpoenaed to testify.

20 Q. And do you recall that that testimony was, in fact, about
21 whether or not Mr. Gillispie had been a suspect in the
22 investigation?

23 A. I just really don't. If you have something that can
24 refresh my recollection on it --

25 Q. Yes.

1 A. -- I can look at it. I just don't remember.

2 MR. McLANDRICH: Let's bring up Plaintiff's Exhibit
3 72.

4 THE COURT: Has that been displayed? Or are you
5 asking -- are you asking Mr. Lieberman to just review it for
6 the purposes of refreshing his recollection, are you asking
7 for it to be displayed? I guess I am looking for a little
8 direction.

9 MR. McLANDRICH: Yes, sir. I would like to refresh
10 his recollection with it. And I'm sorry. I gave you have the
11 wrong number. It's PX-80.

12 MR. KANOVITZ: Could we have page and line?

13 MR. McLANDRICH: Yes. This would be transcript page
14 202-203, and I believe it is -- I'm sorry. Just one second.

15 THE COURT: Do you have the document? Do we have
16 one? Are we looking for -- what are we looking for?

17 MR. McLANDRICH: We should have it up.

18 THE COURT: First, counsel, do you have any problem
19 with that?

20 MS. FRICK: We have no objection, Your Honor.

21 MR. HERMAN: No, Your Honor.

22 MR. KANOVITZ: For the 202-203, I have no objection.

23 THE COURT: Is that what you are asking for,
24 Counsel?

25 MR. McLANDRICH: Yes, sir.

1 THE COURT: It may.

2 (Exhibit displayed.)

3 MR. McLANDRICH: I'm sorry. Go to the next page,
4 please.

5 (Exhibit displayed.)

6 THE WITNESS: Are you asking me to --

7 BY MR. McLANDRICH:

8 Q. Just a moment, please.

9 THE COURT: I am not sure we have a line for you
10 yet.

11 THE WITNESS: Okay.

12 MR. McLANDRICH: I've lost it.

13 BY MR. McLANDRICH:

14 Q. Mr. Lieberman, directing your attention to line 15, do
15 you recall this question and your answer:

16 "Question: Have you read Mr. Bailey's affidavit where he
17 explains that answer?"

18 And he says, "Yes, I interpret it as a tip, and tip is
19 different from lead. I did, yes."

20 "Question: And what is your reaction to that paragraph?"

21 "I don't want to be tongue-tied here. I also don't
22 want -- want to be as respectful as I can. I think that was a
23 bunch of baloney. He was playing games with me."

24 "Question: You feel like you were misled during the
25 trial?"

1 "Oh, yeah, absolutely."

2 Does that refresh your recollection that what you were
3 talking about as baloney was his failure to answer truthfully
4 that Mr. Gillispie had been a suspect?

5 MR. McLANDRICH: You can take that down.

6 THE WITNESS: Yeah. My recollection now is that he
7 was mincing words. So I think in my examination I used the
8 word "lead," and he felt that it wasn't a lead, it was a tip,
9 and that's why he responded the way he did. And that's why I
10 said I thought that was a bunch of baloney. I mean --

11 BY MR. McLANDRICH:

12 Q. Because, in fact, he should have conveyed to you that
13 Mr. Gillispie was a suspect when he had been investigating the
14 case, allegedly?

15 A. If he was, yes.

16 Q. Right. And if, in fact, Mr. Bailey had answered
17 truthfully and conveyed that Mr. Gillispie was a suspect, you
18 might have inquired further with respect to what investigation
19 had been done with respect to Mr. Gillispie as a suspect,
20 correct?

21 A. Actually, I think it might be the inverse of that. If
22 he had indicated that at the early stage Mr. Gillispie was
23 not a suspect, then I probably would have inquired further
24 of him for why he was not a suspect.

25 Q. Yes. And, in fact, the truthful answer would have been,

1 Mr. Gillispie was a suspect but we had eliminated him as a
2 suspect. That would have been the truthful answer from
3 Mr. Bailey, correct?

4 A. That would have been one way of saying it. If -- I
5 don't know that he ever reached the level of suspect, but
6 that certainly would have been one way of saying it, which
7 he didn't say that either.

8 Q. Okay. And so now reaching the level of suspect is the
9 same mincing of words that you were objecting to before with
10 respect to tip versus suspect. Is that what we have?

11 A. I don't know whether that's what we have. What we have
12 are a set of facts where, to my understanding, they did not
13 pursue him as a suspect because the -- it didn't -- the
14 description didn't match and they believed that the
15 information was fraud. That's how I would characterize it.

16 Q. That's supposedly the content of the report that Bailey
17 alleges he wrote?

18 A. Right, right.

19 Q. So backing up. When you became involved in the criminal
20 defense, you retained Area Wide, correct?

21 A. At one point we did, yeah.

22 Q. Yes. And do you recall previous testimony that you've
23 given where you testified that when you first hired Area Wide
24 and Mr. Fritz was assigned to the matter, that you had
25 concerns about that assignment of Mr. Fritz to the case?

1 A. I -- I recall that now that you mention it, yeah.

2 Q. Yes. And, in fact, because you had concerns, you had a
3 discussion with Mr. Fritz about those concerns?

4 A. That could be true.

5 Q. All right. And the reason you had concerns was because
6 he was a police officer from the very department that was
7 involved in the case that you were now defending, correct?

8 A. Yeah, that would -- that would be correct. I would
9 have been concerned whether he would have been able to give
10 me an impartial investigation on it.

11 Q. And in discussing your concerns with Mr. Fritz, would it
12 not be true that one of the things you would seek to
13 understand in that dialog would be whether he had any personal
14 involvement in the case in which you were asking him to be an
15 investigator?

16 A. I don't -- I don't recall that, nor do I -- nor do I
17 really recall getting into that, because if I'm correct from
18 my recollection -- I may not be -- but if I'm correct from
19 my recollection, he had already left the Miami Township at
20 the time that Moore had taken over. And if that was the
21 case, my knowledge at the time was that it was Moore who
22 actually kind of started the investigation again.

23 Q. So your recollection aside, my question is more of a
24 conceptual question.

25 A. Okay.

1 Q. If you were hiring an investigator from a police
2 department that had been on -- I'm sorry. If you were hiring
3 an investigator that worked for the police department that was
4 involved in a case that you were defending, wouldn't you, as
5 just a matter of course, want to know whether that police
6 officer had any involvement with the case that was the subject
7 matter of the criminal trial?

8 A. Based upon --

9 Q. Wouldn't that be prudent, something to know?

10 A. Based upon the way you asked that question, yes. But I
11 didn't know that he had really been intimately involved.

12 Q. Well, and you would only know that if, in fact, you asked
13 the question, correct?

14 A. Well, no. I should have known that through the
15 discovery, I would think.

16 Q. All right. And you would certainly still want to ask
17 that question regardless of any discovery that you received:
18 Were you involved in this case in any fashion?

19 MR. KANOVITZ: Objection to the form of the
20 question.

21 THE COURT: Well, I think the question is whether he
22 asked the question, and did you ask the question?

23 THE WITNESS: I don't recall asking the question.

24 BY MR. McLANDRICH:

25 Q. It would be a prudent question to ask, would it not?

1 A. It may be for some people. I don't recall.

2 Q. And when you were meeting with an investigator that had
3 worked for the police department that was the subject matter
4 of the case -- and not only worked at the police department,
5 you knew that he was the supervisor of detectives before he
6 resigned, correct?

7 A. I knew he was a supervisor, yeah.

8 Q. All right. And so even if you hadn't asked him, wouldn't
9 you expect this investigator to tell you, "Mr. Lieberman, you
10 need to know, I supervised this investigation while I was
11 there." Wouldn't you expect that information to be offered to
12 you in the dialog where you are having a back and forth about
13 your concerns regarding retaining this man who was a former
14 police officer?

15 MR. KANOVITZ: Objection. Calls for speculation.

16 THE COURT: Wouldn't you expect?

17 MR. KANOVITZ: Yes.

18 THE COURT: You can answer it if you can.

19 THE WITNESS: I just -- I don't know how to answer
20 that.

21 BY MR. McLANDRICH:

22 Q. So you --

23 A. It depends on the facts, I think, and what's happened.

24 Q. You wouldn't expect your investigator who you are now
25 hiring to represent your client in a rape case to offer to

1 you, "I worked on this case when I was at the police
2 department. I just want you to know that"?

3 MR. KANOVITZ: Objection; asked and answered.

4 THE COURT: Well, no, it hasn't been.

5 Would you expect that, Mr. Lieberman?

6 THE WITNESS: If there was a reason to do that,
7 yeah, I would expect him to do that.

8 BY MR. McLANDRICH:

9 Q. All right. And wouldn't having seen a report that
10 excluded your client as a suspect be such a reason to disclose
11 that to you?

12 A. Not necessarily.

13 Q. Not in your opinion anyway.

14 A. Well, yeah, you are asking for my opinion. Not
15 necessarily.

16 Q. Wouldn't it be something that certainly in hindsight you
17 would have wanted to know?

18 A. In hindsight, I would have wanted it to have been
19 disclosed in discovery, and I would have asked him about it,
20 absolutely, if I knew about it.

21 Q. Yes. And one of the ways you could have known about it
22 was by him telling you about it?

23 A. Well, yeah. I mean, I suppose that would have been one
24 way I could have known about it. That's -- I guess, the
25 whole answer to that would be assuming that he knew I didn't

1 know about it, or did know about it. I mean, he didn't know
2 what I knew at that stage.

3 Q. If he assumed you knew about it, it would be even a
4 better reason for him to say, 'cause he would assume you
5 already knew about it, "Now you know I worked on this very
6 case, and we wrote a report that excluded Gillispie as a
7 suspect." Wouldn't that be a natural part of that
8 conversation?

9 MR. KANOVITZ: Objection; calls for speculation.

10 THE COURT: Sustained.

11 BY MR. McLANDRICH:

12 Q. All right. So in any event, it's your memory that at no
13 time did Mr. Fritz ever say to you while he was working on
14 this case, "You know, Bailey wrote a report that excluded
15 Gillispie as a suspect." That's your testimony?

16 A. Yes, that's my testimony.

17 Q. All right. And if you had known that -- and I think
18 you've testified to this already -- you would have used
19 Mr. Fritz as a witness, right?

20 A. Yes.

21 Q. And so you might have not known, but Mr. Fritz knew that
22 he could be a witness in this case, right?

23 MR. KANOVITZ: Objection; calls for speculation.

24 THE COURT: As to what Mr. Fritz knew, sustained.

25 BY MR. McLANDRICH:

1 Q. Mr. Fritz had information that was pertinent to your
2 defense of this case. That's your belief?

3 A. That Mr. Fritz had information that was pertinent to my
4 defense of the case. Yeah, I think that's probably true.

5 Q. All right. And it was information that he never gave
6 you?

7 A. It was information that I did not discover until the
8 Innocence Project became involved.

9 Q. Because he never told you?

10 A. Yeah, he never told me.

11 Q. All right. Now, wasn't one of Mr. Fritz's duties to
12 review the discovery packet?

13 A. No.

14 Q. And when Mr. Fritz became involved in the case, you
15 didn't know what his understanding of the case was, correct?

16 A. Correct.

17 Q. And so for him to be able to perform whatever services
18 you wanted him to perform -- which apparently included looking
19 for alibi witnesses, right?

20 A. Specific instructions as it related to alibi witnesses,
21 yes.

22 Q. And so it would be important for him to have the
23 knowledge of the allegations and the evidence that the police
24 had in order to perform his services, correct?

25 A. It would -- not necessarily. It would have required

1 him to do would be to know the days that he allegedly was
2 involved in what he was accused of doing. For an alibi
3 witness, that's all he would have known, is where he was on
4 those days.

5 But to further answer that, yeah, I mean, of course I
6 told him what the allegations were, that he was charged with
7 rape, and gave him a description of that.

8 **Q.** Is it your testimony you didn't give him the police
9 reports in this case?

10 **A.** My testimony is that I don't recall giving him the
11 discovery packet, which would have been everything, not just
12 the police reports.

13 MR. McLANDRICH: Can we bring up PX-80, please.
14 Page 226.

15 MR. KANOVITZ: Just a moment.

16 THE COURT: Has that been disclosed previously?

17 MR. McLANDRICH: I don't know. We talked about it
18 before. I'm not sure it has been disclosed before. It's a
19 prior hearing transcript.

20 THE COURT: Let's get a page and a line before we
21 publish it so that we can publish it, let him testify to it,
22 and then take it down.

23 MR. McLANDRICH: I'm sorry. I withdraw that for the
24 moment.

25 THE COURT: All right. I think the other thing I

1 would suggest, counsel, from this point forward, if we are
2 going to use transcript testimony to refresh recollection, you
3 let us know what your exhibit is and what your page and line
4 is, and we'll get him a hard copy. There is no reason for the
5 purposes of refreshing your -- refreshing recollection that we
6 display transcript pages.

7 BY MR. McLANDRICH:

8 Q. You testified earlier that Mr. Moore went to the
9 campground to look for campground receipts. Do you recall
10 that testimony?

11 A. That's my understanding of what Mr. Moore said, yes.

12 Q. All right. Isn't it a fact that in the first trial you
13 objected to the campground receipts because, in fact,
14 Mr. Moore didn't go down there and get them; in fact, they
15 were mailed to him?

16 A. I don't recall whether that would have been the
17 substance of my objection or even if I objected.

18 Q. All right.

19 MR. McLANDRICH: Can we go to PX-3, page 154.

20 THE COURT: Is this refreshing or is this
21 impeachment?

22 MR. McLANDRICH: Well, this is, I suppose,
23 refreshing since he says he really doesn't remember the reason
24 for his objection.

25 THE COURT: Mr. Lieberman, we will get you a hard

1 copy. Somewhere in those binders.

2 Does Mr. Lieberman have the page?

3 THE WITNESS: What page and line, Your Honor?

4 THE COURT: I don't know yet.

5 MR. McLANDRICH: I'm sorry. The computer is being
6 uncooperative.

7 I'm sorry. I can't even read it, Your Honor. I'm going
8 to see if I can pull it up one more time. Then if not, I'll
9 move on.

10 BY MR. McLANDRICH:

11 Q. If you would go to page 154, line 13, please.

12 "Question: You have three cards in your --"

13 THE COURT: I thought we were refreshing his
14 recollection.

15 MR. McLANDRICH: Oh, that's fine.

16 BY MR. McLANDRICH:

17 Q. So if you would read lines 13 through line 18, please.

18 A. Okay. I've done that.

19 Q. Does Mr. Moore, in fact, testify that the receipts were
20 mailed to him, not that he went down there personally?

21 A. He says that the receipts were mailed to him, but your
22 question to me was the basis of my objection. I didn't -- I
23 didn't object to that. My objection was previous, on line
24 10, where I say, "Objection," and the Court says, "I'll
25 sustain the objection," and it really had nothing to do with

1 that.

2 Q. Well, actually, I think if we went on in the transcript
3 we would see that there was subsequent dialog where the
4 receipts were excluded, and, of course, unfortunately, this
5 court didn't put the sidebars into the transcript. So we
6 don't know the nature of what occurred at sidebar. What we
7 have is the dialog about the receipts and the receipts being
8 excluded.

9 But in any event, the testimony reflects that the
10 receipts were mailed to Mr. Moore, not that he went down there
11 personally?

12 MR. KANOVITZ: Objection to the narrative portion,
13 and move to strike the narrative portion.

14 THE COURT: I agree. It will be stricken.

15 This witness doesn't remember objecting with regard to
16 that question.

17 BY MR. McLANDRICH:

18 Q. Do you see anywhere in the transcript where it reflects
19 that Mr. Moore personally went to Kentucky to get the
20 receipts?

21 A. On the page that you provided to me, page 154?

22 Q. Yes, sir.

23 A. I see nothing there that he personally went there to
24 get the receipts.

25 Q. And do you have any other basis upon which to testify

1 that Mr. Moore personally went to Kentucky?

2 A. It is my understanding that I discovered that that
3 happened, but I can't tell you when or how.

4 Q. Is it likely something that was just told to you that may
5 be, in fact, incorrect?

6 A. I can't answer that. What I can -- can tell you is I
7 think there may have been a discussion of it in his grand
8 jury testimony, which I didn't have available at that time,
9 about going down there.

10 And if I may, to fully answer your question, in the
11 transcript itself, he says he obtained them from Fred
12 Marriott. "He mailed them to me." My recollection --

13 Q. You have answered my question.

14 A. Okay.

15 Q. Thank you.

16 What was Roger Gillispie's pant size?

17 A. I don't remember.

18 Q. Well, you testified it would have been much smaller than
19 whatever it is that Mr. Bailey supposedly believes he saw, but
20 you don't know what that pants size is?

21 MR. KANOVITZ: Objection; mischaracterizes the
22 witness's testimony. He's got it backwards.

23 THE COURT: Okay. The only question before
24 Mr. Lieberman, which he's answered, is what was his pants
25 size, and he doesn't remember.

1 MR. McLANDRICH: All right.

2 THE COURT: The rest of it is just a dialog going
3 on.

4 And based upon the objection, the Court's going to strike
5 the dialog. Ladies and gentlemen, after the answer that he
6 doesn't remember, the rest of that is stricken. Please don't
7 have that play any part in your considerations.

8 BY MR. McLANDRICH:

9 Q. Do you have any personal knowledge that Mr. Moore ever
10 had receipts for the Kentucky campground from August?

11 A. If you are asking me whether I ever saw receipts in his
12 possession, no, I did not.

13 Q. And anything you know about that would have been told to
14 you by somebody else?

15 A. It would have been told to me by someone else, that's
16 correct.

17 Q. Now, you were asked some question about C.W. being unable
18 to make an identification. In fact, C.W. made an
19 identification, correct?

20 A. C.W. did make an identification, yes.

21 Q. Both pretrial and at trial, correct?

22 A. C.W. made an identification from a photo spread and
23 also at trial, which I think is what I said.

24 Q. And anything that you know about Mr. Bailey having
25 allegedly written a report that excluded Mr. Gillispie again

1 would have been something you were told by someone else?

2 A. Or in their affidavits, yeah.

3 Q. Which is the same thing. They are just telling you in
4 the affidavit?

5 A. Well, except one's under oath. The affidavits are
6 under oath.

7 Q. Yes. But not subject to cross-examination.

8 THE COURT: Okay. It's something that someone else
9 told him, regardless of what the form was.

10 BY MR. McLANDRICH:

11 Q. Correct?

12 A. Correct.

13 Q. And the only information that you have about any
14 allegation that alleges Detective Moore would have ever been
15 in possession or not produced such a report would also be
16 something that someone else told you, correct?

17 A. Correct, yes.

18 Q. Did you interview Mr. Bailey prior to the first trial?

19 A. No, I don't recall interviewing Mr. Bailey prior to the
20 first trial.

21 Q. Didn't this issue of the hair surface between the first
22 trial and the second trial?

23 A. Yes.

24 Q. So all the things that you testified that you put on in
25 the defense of this case with respect to Mr. Gillispie,

1 whether it be the challenge to the photo array, whether it be
2 the tan, whether it be the smoking, the clothes, the jewelry,
3 all those things were obviously insufficient to carry the day
4 with both juries, correct?

5 A. Yeah, that would be correct. They found him guilty.

6 Q. And you had the photo array before the trial and, in
7 fact, hired an eyewitness identification expert, correct?

8 A. That's correct.

9 Q. And that person testified to the science of eyewitness
10 identification as it existed at the time of that trial?

11 A. That's correct.

12 Q. And notwithstanding that testimony, the girls testified
13 that they identified -- the ladies testified that they
14 identified Mr. Gillispie. And the jury, as you've said,
15 apparently believed that testimony, correct?

16 A. I believe the jury believed the three women, yes.

17 Q. And as I think you started off your testimony saying,
18 this was a case that was always going to be an eyewitness
19 identification case because there was no DNA, there were no
20 fingerprints. So if this case was ever going to get resolved,
21 whether for conviction or acquittal, it was going to hang on
22 eyewitness identification?

23 A. That's correct.

24 Q. All right. And the things that you testified with
25 respect to your challenges to the array were all presented at

1 the trial. The size of the head, the finish of the photo, the
2 color of the background, all those things were the subject of
3 your cross-examination at that time, correct?

4 A. I don't recall the specifics. I know generally I did
5 at trial also challenge that, yes.

6 Q. Well, those were things you identified to plaintiff's
7 counsel as things that you thought were inappropriate about
8 the array?

9 A. Yes, correct.

10 Q. And if you felt they were inappropriate about the array,
11 you certainly would have presented them at trial in challenge
12 to the array, fair?

13 A. I think that's probably fair. I just don't recall the
14 specifics.

15 Q. I understand. It's been a long time.

16 A. It has.

17 Q. And the expert eyewitness that you would have put on --
18 I'm sorry. The expert in eyewitness identification that you
19 would have put on would have spoken to those sorts of things
20 during his testimony, you would expect. I understand you
21 don't exactly remember, but --

22 A. Yeah. And I -- I don't -- it would depend on what the
23 judge would allow him to do, how specific he would allow him
24 to get.

25 Q. All right. Now, you testified earlier about the second

1 trial and that the jury was initially 8-4, and then the judge
2 gave the charge to the jury to ask them to continue to
3 deliberate, correct?

4 A. Yes, I do.

5 Q. And you don't know why that jury came back 12-0 for
6 guilty, correct?

7 A. No, I do not.

8 Q. All right. And presumably -- well, strike that.

9 If Mr. Fritz had knowledge of a witness that was
10 impactful to your defense, would you want him to bring you
11 that information?

12 A. Of course I would.

13 Q. And so while you may not have been aware, certainly
14 Mr. Fritz, you now believe in retrospect, was aware of
15 Mr. Bailey and the usefulness or impact that he could have had
16 in the criminal trial, correct?

17 MR. KANOVITZ: Objection; asked and answered
18 previous.

19 THE COURT: Sustained. And he is asking about
20 Mr. Bailey's feelings. So sustained.

21 BY MR. McLANDRICH:

22 Q. You have testified already that Mr. Bailey, you believe,
23 would have been an impactful witness?

24 A. I thought Mr. Bailey was a witness at one point in
25 time. So I don't understand your question. I'm sorry.

1 Q. Well, my question is directed to the fact that you have
2 testified that you've subsequently come to be told that
3 Mr. Bailey had written this report that excluded
4 Mr. Gillispie, and that had you known that, you could have
5 made use of it in a substantial way at trial. Did you not
6 testify that way?

7 A. Yeah, similar to that, yes.

8 Q. All right. And so you would have wanted Mr. Fritz,
9 certainly as your investigator, to come forward and tell you
10 that, right?

11 MR. KANOVITZ: Objection; asked and answered.

12 THE COURT: Well, it has been asked and answered,
13 but can you answer that? Would you want him to come forward?

14 THE WITNESS: I -- of course I would want him to
15 come forward if he believed I did not know that information.

16 BY MR. McLANDRICH:

17 Q. Thank you. That's all I have for you.

18 THE COURT: Counsel.

19 **CROSS-EXAMINATION**

20 BY MR. HERMAN:

21 Q. Good morning, Mr. Lieberman.

22 A. Good morning.

23 Q. My name is Chris Herman. I think we have we've met
24 before. I used to be a prosecutor in the county, but I
25 represent the Miami Township Board of Trustees in this matter.

1 A. Okay.

2 Q. You've been an attorney for well over 40 years, correct?

3 A. 44.

4 Q. 44 years. Same year I was born. I'm 44 this year. So
5 you have been practicing for as long as I have been on this
6 earth.

7 A. Thank you for that.

8 Q. So 44 years ago you took an oath as an attorney to uphold
9 the Constitution, the laws of the United States, correct?

10 A. I did.

11 Q. You took an oath to uphold the Constitution and the laws
12 of the State of Ohio, correct?

13 A. I did.

14 Q. Now, in the 44 years that you have been practicing as an
15 attorney, is it fair to say you've had quite a lot of
16 experience working with police departments in Montgomery
17 County and the surrounding counties, including the detectives,
18 police officers, police chiefs, and everybody that would be
19 connected to the police department, correct?

20 A. I think that's a fair statement.

21 Q. Now, are you aware whether or not a police officer, when
22 they are hired by a department or when they pass whatever
23 tests are required to become a police officer, are you aware
24 of whether or not they have to take an oath of office
25 themselves?

1 A. It's my understanding they do, yes.

2 Q. And what is your understanding as to the oath of office
3 that a police officer takes?

4 A. Oh, gosh, I don't know the verbiage of it. But
5 basically, they have to follow the Constitution and the laws
6 of the State of Ohio also.

7 Q. So it would be similar to the oath that you took as an
8 attorney 44 years ago, correct?

9 MR. KANOVITZ: Objection; calls for speculation.

10 THE COURT: I think he's --

11 MR. HERMAN: I can clarify.

12 THE COURT: All right.

13 BY MR. HERMAN:

14 Q. With respect to police officers swear an oath to uphold
15 the Constitution of the United States and all the laws of the
16 United States, and to also uphold the Constitution and the
17 laws of the State of Ohio, correct?

18 A. That's my understanding, yes.

19 Q. Now, through the course of your practicing for 44 years,
20 have you become familiar with, I'll say, police practices in
21 terms of preparing police reports?

22 A. They vary, but, yeah, I think I've experience a lot of
23 that.

24 Q. Okay. And have you also become familiar with police
25 officers' investigation of cases and the creation of photo

1 spreads and how they go about creating those photo spreads
2 through your work as an attorney?

3 A. Yes, I've become familiar with that.

4 Q. So through the course of your career as an attorney, have
5 you also been -- have you become familiar with a police
6 officer's duties or responsible -- responsibilities
7 concerning, for example, the collection of evidence in a case?

8 A. That's kind of general. Each officer has different
9 responsibilities when they arrive at a scene, for example.
10 So it kind of depends on what -- on what we're talking
11 about. Yeah, I'm familiar with some of it.

12 Q. So it's not just police officers that, let's say, for
13 example, respond to the scene of a crime and collect evidence.
14 Also, on down the line there might be other officers that
15 become involved, say, for example, detectives, that gather
16 evidence related to the investigation of a crime, correct?

17 A. Correct.

18 Q. Okay. And is it your understanding through the course of
19 your career that police officers also have a duty, not only do
20 police officers, but detectives and anybody else that's
21 connected to the investigation of that case, to maintain and
22 keep that evidence that they gather and collect through the
23 course of the investigation?

24 A. Yes.

25 Q. And why is it important for you as a defense attorney for

1 a police officer, a police department, a detective, and
2 anybody else that's involved with the investigation of that
3 case to keep and maintain records of their investigation of
4 cases?

5 A. Well, for many of the reasons that I've already
6 articulated today: that if there is evidence that hasn't
7 been turned over, that we need to know that so that we can
8 ultimately acquire that evidence, and it could have
9 significance in the defense of a case. That's one of the
10 reasons. There's a myriad of other reasons, I believe.

11 There would be reasons for appeal. There would be
12 reasons for the trial itself that they should keep and
13 maintain evidence.

14 Q. And if you could share with us a little bit about your
15 knowledge as to the process of when a police department
16 investigates a crime and they want to seek charges on that
17 investigation, they will go to a prosecuting attorney and ask
18 them to review the investigation, correct?

19 A. Yeah, most of the time I think that's correct.

20 Q. All right. And do you have an understanding when a
21 police officer or a detective comes and meets with the
22 prosecutor to seek charges, whether or not that officer
23 provides every piece of evidence related to that case to the
24 prosecutor for that prosecutor to evaluate the merits of the
25 investigation and what charges to charge -- what charges to

1 pursue?

2 A. At what point in time? At the initial meeting with the
3 prosecutor?

4 Q. Well, let's break it down. So, yes, at the initial
5 meeting with the prosecutor, what's your understanding of what
6 should be turned over at that time?

7 A. Well, ideally, my understanding would be that they turn
8 all the evidence over that they have been able to compile so
9 that the prosecutor would be able to look at everything
10 that's involved. That ideally would be what I would believe
11 should happen.

12 Q. So if I could -- if I would use the term like the good,
13 the bad, and the ugly of the investigation, all of that,
14 whether it's helpful to the prosecution or helpful to the
15 defense, that should be turned over to the prosecutor in their
16 initial review, correct?

17 A. That would be the ideal situation. In practice, I
18 don't think that's always the case.

19 Q. Now, that responsibility to provide that information to
20 the prosecutor does not cease after their initial meeting,
21 correct? It's an ongoing duty if the case is still being
22 investigated, correct?

23 A. That's correct, yes.

24 Q. And let's skip ahead, okay, to the point where charges
25 have been brought by a prosecutor after a -- after a police

1 detective or a police department has presented all the good,
2 the bad, and the ugly, and now we have a charge, correct?

3 After that person is charged, that duty continues for the
4 police department and the police detective and whoever's
5 involved in that case to continue to provide whatever ongoing
6 investigation has occurred not only to the prosecutor, but
7 then also to you as the defense attorney, correct?

8 A. Yes.

9 Q. And you've been practicing in Montgomery County for 44
10 years, and it's my understanding that there is what's called
11 an open discovery policy with Montgomery County Prosecutor's
12 Office, correct?

13 A. There is now, yes.

14 Q. There is now.

15 A. Yeah.

16 Q. So when you started as a lawyer, there was not one in
17 place at that time, correct?

18 A. When I started as a lawyer, there was Rule 16, which
19 still required the production of most everything. But it
20 was changed later on, and without getting into the law, the
21 bottom line is they've always been in a situation in
22 Montgomery County where they are supposed to give you
23 everything.

24 Q. Okay. Let's talk about relevant to this matter in 1990-
25 1991, that time period. Would there have been an open

1 discovery policy by the Montgomery County Prosecutor's Office
2 at that time, if you recall?

3 A. There was supposed to have been, yes.

4 Q. And can you share with the jurors, what does it mean to
5 have an open discovery policy in Montgomery County?

6 A. What it theoretically means is that the prosecutor will
7 show you all of the evidence that they have in the case --
8 to use your terminology, the good, the bad, and the ugly --
9 so that if there was evidence that would support the defense
10 case, they are supposed to show you that, and that's by law,
11 called *Brady versus Maryland*.

12 They are also supposed to show you police reports, and
13 they are supposed to show you other evidence -- laboratory
14 reports, physical evidence -- and that's everything that
15 they are supposed to show you.

16 Q. Okay. And now some of -- some evidence in a case will be
17 more important than other evidence in a case. Is that fair?

18 A. I think that's a fair statement, yes.

19 Q. Okay. You've been practicing, I know, for a while. And
20 I wonder if you have an understanding as to what -- what is
21 material evidence and what is exculpatory evidence, in your
22 experience working as a defense attorney here for 44 years?

23 A. Okay. So --

24 MR. McLANDRICH: Objection, Your Honor.

25 THE COURT: Basis?

1 MR. McLANDRICH: It's calling for a legal opinion, a
2 description of the law.

3 THE COURT: I'll let this witness testify to his
4 understanding of those types of evidence.

5 THE WITNESS: So material evidence, it's my
6 understanding material evidence is that evidence which
7 basically directly impacts the case or can have a direct
8 impact on a case. It's not stuff that doesn't really matter.
9 It's not irrelevant things. It's things that are very
10 relevant and could make something, I am going to use a legal
11 term, more probative than not. That would be material.
12 "Probative" meaning essentially more likely to have occurred
13 than not.

14 BY MR. HERMAN:

15 Q. And let me -- let me interject real quick. So material
16 in that context, that could be evidence that's good for the
17 defense and it could be evidence that's bad for the defense,
18 correct?

19 A. Correct. That's correct, yes.

20 Q. And it could be evidence that's good for the State, and
21 it could be evidence that's bad for the State?

22 A. That's correct, yes. It goes both ways.

23 Q. So then exculpatory evidence, your understanding.

24 A. So exculpatory evidence is that evidence which, to use
25 your terms, is good for the defense. It is evidence that

1 the defendant did not commit the crime, or it's evident that
2 a crime was never committed. That's basically what
3 exculpatory evidence is.

4 Q. And you've referred to *Brady* material, correct?

5 A. I have, yes.

6 Q. And is *Brady* material, is that what we're talking about
7 whether we talk about exculpatory evidence or exculpatory
8 discovery material?

9 A. It's a little more broad than that. And I kind of feel
10 I'm in one of my classes here, but it's -- *Brady* encompasses
11 even a little bit more than just clearly exculpatory. It's
12 favorable. So that it may not be necessarily exculpatory,
13 but if it's even favorable to the defense or it could lead
14 to evidence which would be exculpatory, then it's supposed
15 to be turned over also.

16 Q. So one of the issues I think in your defense of
17 Mr. Gillispie through the criminal trials and everything and
18 subsequently learning thereafter about this supplemental
19 report that was allegedly authored by Gary Bailey and Steven
20 Fritz, correct?

21 A. That's my understanding, yes.

22 Q. All right. And was it your position, then, that that
23 supplemental report would have been exculpatory evidence that
24 you would have liked to have known about at both the first and
25 the second criminal trials?

1 A. Yes.

2 Q. And at the first trial, you did not have any knowledge
3 about that report, correct?

4 A. Correct.

5 Q. And you didn't have any knowledge about that report at
6 the second criminal trial either, correct?

7 A. That's correct.

8 Q. Prior to you being hired by Mr. Gillispie to defend him
9 in those criminal cases, have you ever defended a case
10 involving any alleged destruction of exculpatory evidence in
11 any of your criminal trials from 1990 going back to when you
12 became an attorney in 1978?

13 MR. KANOVITZ: Your Honor, objection to the scope of
14 what is supposed to be covered with this party, as well as
15 getting to the point of undisclosed expert testimony.

16 THE COURT: Well, first, he is cross-examining, and
17 cross-examining, the scope is wide. And so as to that,
18 overruled.

19 I'm not quite sure I understand the other part of your
20 objection.

21 MR. KANOVITZ: It's a 26(a) -- actually, may I
22 withdraw that and let me see where this goes?

23 THE COURT: You may.

24 MR. KANOVITZ: Thank you.

25 THE COURT: Do you remember the question,

1 Mr. Lieberman?

2 THE WITNESS: If I remember it, I think he's asking
3 me if I ever had a situation where there was an allegation of
4 the destruction of exculpatory or material evidence from the
5 day I was sworn in as a lawyer in 1978 until the date of this
6 trial?

7 BY MR. HERMAN:

8 Q. That's correct, in 1990-91, yes.

9 A. Okay. So the answer to that is I have a very, very
10 vague recollection that I believe I did, but I can't even
11 tell you the case. I know that there were some allegations
12 that I wrote some briefs on during that time period.

13 Q. But in that time period, just one vague remembrance of a
14 potential issue involving that, correct?

15 A. Yeah. As I sit here right now, yeah. I could
16 probably -- I am not going to offer to do that. I guess
17 just as I sit here right now.

18 THE COURT: I think you have answered it. Go ahead.

19 BY MR. HERMAN:

20 Q. Now, let's look at the time frame after the criminal
21 trials in Mr. Gillispie's case in 1991. Had you ever, in your
22 practice as a criminal defense attorney, had cases involving
23 the later discovery of an exculpatory supplemental report, or
24 any exculpatory material in your practice?

25 MR. KANOVITZ: Objection to undisclosed expert

1 testimony at this point. Under 26(a).

2 THE COURT: He is asking whether or not -- your
3 question is whether or not he's had experience with regard to
4 trials that he's been involved in which involve undisclosed
5 exculpatory evidence later?

6 MR. HERMAN: Yes. And maybe "experience" is not the
7 best word. Maybe have you had a case where, and then --

8 THE COURT: I'll let him answer that. But I think
9 that may be where we go. This might be it.

10 THE WITNESS: Yes.

11 BY MR. HERMAN:

12 Q. And can you share with us how many occasions have you had
13 that instance happen after Mr. Gillispie's criminal trials?

14 MR. KANOVITZ: Objection.

15 THE COURT: Overruled.

16 THE WITNESS: I can give you a rough estimate of
17 maybe five.

18 BY MR. HERMAN:

19 Q. So is it fair to say it doesn't happen that often?

20 A. I think that's a fair statement, yes.

21 MR. KANOVITZ: I belatedly object that that was
22 expert testimony and move to strike.

23 THE COURT: It will stand.

24 I assume, Mr. Lieberman, that was based on, in your
25 experiences, not very often?

1 THE WITNESS: That is correct, Your Honor.

2 BY MR. HERMAN:

3 Q. Mr. Lieberman, would there be any lawful reason for a
4 police department, a detective, a police officer, or even the
5 State of Ohio, the prosecutor, to not turn over exculpatory
6 evidence in the case?

7 MR. KANOVITZ: Objection; calls for expert opinion
8 testimony that he's not disclosed.

9 THE COURT: Do you want to rephrase your -- I mean,
10 you are asking him to -- sustained.

11 BY MR. HERMAN:

12 Q. Would the withholding of exculpatory evidence in a
13 criminal case be a violation of the oath of office that an
14 attorney takes?

15 MR. KANOVITZ: Same objection.

16 THE COURT: Can you answer that question,
17 Mr. Lieberman?

18 THE WITNESS: Not directly, Your Honor.

19 THE COURT: He can't answer the question.

20 BY MR. HERMAN:

21 Q. So as an attorney, you've sworn an oath to uphold the
22 laws and the Constitution of the United States, correct?

23 MR. KANOVITZ: Objection; asked and answered.

24 THE COURT: Overruled.

25 THE WITNESS: That's correct, yes.

1 BY MR. HERMAN:

2 Q. And you've referred to a case, *Brady versus Maryland*,
3 which sets forth the requirement that all evidence, as you've
4 said earlier, is to be turned over to the defense, correct?

5 A. Correct.

6 Q. Now, if a prosecutor does not turn over *Brady* material to
7 a defense, would that be a violation of that attorney's oath
8 of office to uphold the laws and the Constitution of the
9 United States?

10 MR. KANOVITZ: Objection; undisclosed expert opinion
11 testimony, and also outside the scope.

12 THE COURT: Approach. Approach.

13 (At sidebar.)

14 THE COURT: First, I think this question has been
15 asked and answered about four or five times, but -- well, are
16 you saying that he's answering as an expert?

17 MR. KANOVITZ: Yes. When he is asking for opinion
18 about anything other than what Mr. Lieberman himself did, he
19 is asking for expert opinion testimony.

20 Also, to the extent that he's asking about the other laws
21 of issues of the lawyers, that's not even what they are
22 allowed to participate in the trial on. They are allowed to
23 participate only about the police officer.

24 MR. HERMAN: Mr. Herman on behalf of Miami Township.
25 The point of this is to get to, we have a very narrow --

1 THE COURT: Right.

2 MR. HERMAN: And it is, if it's beyond -- I'm sorry,
3 if it's not in good faith, and I don't think that
4 Mr. Lieberman can say what is good faith or bad faith on
5 behalf of an officer.

6 THE COURT: Right.

7 MR. HERMAN: But if it's beyond the scope of
8 employment or outside official duties -- and I've established
9 that official duties include not only for a police officer but
10 an attorney to turn over this type of material.

11 THE COURT: Okay.

12 MR. HERMAN: And because of that oath, I think he
13 should be able to also testify that a police officer is also
14 violating that oath if he doesn't turn that stuff over to the
15 prosecutor.

16 MR. KANOVITZ: Again, I come back to he has not been
17 disclosed as a police practice expert. They have a police
18 practices expert who they are going to call and that person is
19 properly disclosed. This man has not been disclosed for that.

20 Secondly, the idea that stage one is to show what a
21 lawyer's obligation is and what a police officer's obligation
22 is, that does not follow as a matter of logic even if he had
23 been disclosed. So I still believe I stand on my objections.

24 MR. McLANDRICH: I would tend to agree simply
25 because the police officer's legal duty to disclose is a

1 question of law, and I don't think it's in dispute. I don't
2 think we need this witness to testify.

3 THE COURT: He's already -- I think we have already
4 had testimony to that effect too.

5 MR. HERMAN: Okay.

6 MR. KANOVITZ: Can we address one scheduling issue
7 while we are over here? So Mr. Lieberman has to pick a jury.
8 This estimate, I estimated for him he'd be done by lunchtime.
9 I have only five minutes or ten minutes.

10 THE COURT: How much more do you got?

11 MR. HERMAN: Not much longer. I will look at my
12 notes.

13 MR. KANOVITZ: So if we go five minutes over is that
14 okay?

15 THE COURT: Maybe five minutes, yes.

16 (In open court.)

17 THE COURT: Court's going to sustain the objection.

18 MR. HERMAN: That's all I have, Your Honor. Thank
19 you.

20 THE COURT: Thank you.

21 Now, Counsel, redirect. I'll give you a scope: Within
22 the scope of those things covered on cross.

23 MR. KANOVITZ: Will do, Judge. Thank you.

24 **REDIRECT EXAMINATION**

25 BY MR. KANOVITZ:

1 Q. Sir, you were asked questions about how many times you
2 have come to know that evidence was lost or destroyed in a
3 case that you personally worked on, correct?

4 A. Correct.

5 Q. Are you familiar with the term "proving a negative"?

6 A. I am.

7 Q. Okay. Now, if evidence was lost or destroyed on a case
8 that you worked on and no one later came and told you about
9 it, would you have any way to know?

10 A. No.

11 Q. So, in fact, it may be that you've litigated many cases
12 where evidence was lost or destroyed?

13 A. I guess that's possible.

14 Q. And isn't that the sort of thing that, like, defense
15 lawyers hope doesn't happen?

16 A. Oh, absolutely.

17 Q. You were asked questions about a term "material
18 evidence." Do you recall that?

19 A. Yes.

20 Q. That's a term that gets used in law school?

21 A. Yes.

22 Q. Okay. And is there some degree of subjectivity when
23 someone is trying to determine whether evidence is material or
24 not?

25 A. Oh, yeah, there is, yes.

1 Q. So two people with two different sets of assumptions
2 could disagree; is that correct?

3 A. Correct.

4 Q. Okay. And is it fair to say an officer might not
5 recognize if evidence is material or not?

6 A. I guess that would be fair.

7 Q. Would it also be true, though, that the duty to turn it
8 over is absolute? It doesn't matter whether the officer
9 recognized it or not, correct?

10 A. That's correct.

11 MR. McLANDRICH: Objection.

12 THE COURT: I'll allow it.

13 BY MR. KANOVITZ:

14 Q. You were asked about *Brady* evidence. You used the term
15 "favorable" as sort of the scope of *Brady* evidence. Is the
16 term "impeachment evidence" used when talked about with *Brady*?

17 A. There has been a number of cases since *Brady*, and I do
18 believe that impeachment is one of those that you could use
19 for a *Brady* challenge, yes.

20 Q. And once again, is impeachment evidence, evidence that
21 would allow you to challenge the credibility of a witness at
22 trial?

23 A. Yes.

24 MR. McLANDRICH: Your Honor, might we approach for a
25 moment?

1 THE COURT: Surely.

2 (At sidebar.)

3 MR. McLANDRICH: John McLandrich for Moore. It's
4 very disturbing to me that the witness has misstated the law
5 with respect to a police officer's duty to disclose. The law
6 is extremely clear that the officer's duty is to disclose
7 evidence that is apparent, the materiality and exculpatory
8 nature of it is apparent, not that it's this blanket duty to
9 disclose anything that someone after the fact decides is
10 material, and this witness has misstated the law in that
11 regard. I mean, that's --

12 MR. KANOVITZ: My -- I think that's exactly what
13 he's testified to, the *Brady* duty is absolutely. The police
14 officer might not recognize whether something is material or
15 not. He's still supposed to get the evidence.

16 MR. McLANDRICH: But we're here for a *Brady* civil
17 claim, and the *Brady* civil claim is bounded by, it has to be,
18 its materiality has to be apparent to the officer. The
19 duty -- so now we are confusing the duty to disclose in a
20 criminal case and criminal discovery from the civil liability
21 standard, and his saying that from the stand I think is
22 prejudicial to Moore with respect to the civil liability
23 standard.

24 Now, if you want to clarify to the Court what he is
25 talking about is criminal law versus the civil liability

1 standard, maybe that kind of clears it a little bit, but
2 that's --

3 THE COURT: See, you guys are treading into the law,
4 and I have given you some flexibility, and I shouldn't have.

5 MR. KANOVITZ: Obviously, I am just following up on
6 where they went, but maybe the right way to handle this is
7 just tell the jury that they are going to receive instructions
8 on the law from you and anything that they are hearing on the
9 stand is just for purposes of establishing this witness's
10 testimony.

11 THE COURT: So you are not going any further with
12 regard to any of the law?

13 MR. KANOVITZ: No, no.

14 MR. MAYER: I would recommend that you give some
15 kind of limiting instructions to the jury at this time, saying
16 if there is any conflict between what you instruct them.

17 THE COURT: All right.

18 MR. KANOVITZ: No objection.

19 (In open court.)

20 THE COURT: Ladies and gentlemen, you've heard some
21 questioning, some answers with regard to certain legal terms,
22 certain legal theories. But what the Court is going to tell
23 you is that the Court at some point in time at the end of the
24 trial will be instructing you with regard to the definitions
25 of the terms that you have just heard discussed here. If

1 there is any kind of disagreement or if there is questions
2 raised by the different definitions or the different
3 interpretations that counsel has posed in their questions, the
4 Court -- those should be ignored and you should pay close
5 attention to what the Court instructs you with regards to
6 those terms and the law.

7 Remember when we started out, you are the trier of the
8 fact. I will give you the law. Not the attorneys. Not the
9 witnesses.

10 Anything further, counsel?

11 MR. KANOVITZ: To inquire of the witness, but not on
12 the instruction.

13 THE COURT: I understand. Anything about that?

14 MR. KANOVITZ: No, Judge.

15 MR. McLANDRICH: No, thank you, Your Honor.

16 MR. HERMAN: No, Your Honor.

17 MR. KANOVITZ: May I proceed?

18 THE COURT: Yes. It's my understanding you are
19 going to move on.

20 MR. KANOVITZ: Yes.

21 BY MR. KANOVITZ:

22 Q. You were asked questions about why you didn't have
23 Mr. Fritz review the whole file. Do you recall that?

24 A. Yeah, I recall.

25 Q. Why didn't you just give the whole file to Mr. Fritz and

1 say review this and do the investigation that you think is
2 appropriate?

3 A. Mr. Fritz -- well, Area Wide was charging us on an
4 hourly basis. And so to review the entire file would have
5 been a charge to the family that didn't have the money to do
6 it. So I was very specific in what I gave them.

7 Q. And did you utilize Mr. Fritz in the way that you
8 typically do in situations where there are limited resources?

9 A. Yes.

10 Q. And you testified that you do not have personal knowledge
11 about the camping receipts from August, correct?

12 A. That's correct.

13 Q. And if there had been evidence at the grand jury that
14 Mr. Moore possessed the cards from August, is that the sort of
15 thing that could have allowed you to seek to obtain the grand
16 jury transcript?

17 A. Yes.

18 Q. And then could you have used that evidence at trial?

19 A. If the judge would have allowed it, yes.

20 Q. Okay. You -- you were asked questions about whether
21 using the term "suspect," and you, you said, reached the level
22 of suspect. Can you just explain to the jury what you meant?

23 A. Well, there's different terminology in different law
24 enforcement areas, and you can be a person of interest --

25 MR. McLANDRICH: Objection, Your Honor.

1 THE COURT: Sustained.

2 BY MR. KANOVITZ:

3 Q. Did -- I'll move on.

4 You were asked about some testimony where you said you
5 felt that Detective Bailey had answered the prosecutor's
6 questions with a bunch of baloney and was playing games.

7 Do you recall that? Or maybe -- I'm sorry -- your
8 questions.

9 A. It was my -- yeah, it was a question I had asked him at
10 trial, and I didn't -- I either used the word "lead," and he
11 responded negatively and then said he would have responded
12 affirmatively if I said "tip." So, yeah, I thought that was
13 just playing games.

14 Q. Is it uncommon for, when detectives are called by the
15 prosecution, for them to play word games when you try to
16 cross-examine them?

17 A. It depends on the detective. It really does. It's
18 hard to tell you whether that's common or not.

19 Q. And you were asked questions about C.W. making an
20 identification of Dean from the photo array. Do you recall
21 that?

22 A. I do, yes.

23 Q. And is it the case that the information that you had
24 through discovery and at trial was that she did make an
25 identification, correct?

1 A. Correct, yes.

2 Q. And if you had received evidence that, in fact, she was
3 unable to make an identification, would that have been useful
4 to you at trial?

5 A. Yes, it would have.

6 Q. And relatedly, if you had received information that
7 during the identification procedure Detective Moore felt it
8 appropriate to read the sentence that should be read or that
9 may be read when a witness cannot make an identification, that
10 would have been useful to you as well?

11 A. Yes.

12 MR. KANOVITZ: No further questions.

13 THE COURT: Counsel, anything else?

14 MR. McLANDRICH: Yes.

15 THE COURT: With regard to those matters.

16 MR. McLANDRICH: Yes. Just briefly, Your Honor,
17 assuming that I can get this to work.

18 **RECROSS-EXAMINATION**

19 BY MR. McLANDRICH:

20 Q. You testified just a moment ago that the question that we
21 were talking about earlier where Mr. Bailey misrepresented at
22 the first trial was asked by you, isn't the truth that that
23 question was actually asked by the prosecutor, not by
24 yourself?

25 A. I don't think so. But, you know, I don't recall. I

1 thought it was by me.

2 MR. KANOVITZ: I believe counsel's correct, and we
3 will stipulate that it was by the prosecutor.

4 THE WITNESS: Then I was wrong.

5 THE COURT: Hold on. Will a stipulation solve that?

6 MR. McLANDRICH: Yes, sir, Your Honor.

7 THE COURT: Give me the stipulation.

8 MR. KANOVITZ: I was mistaken. I stipulate that the
9 person that was asking the questions of Detective Bailey at
10 the time that we were just talking about was the prosecution,
11 not the defense.

12 THE COURT: All right.

13 BY MR. McLANDRICH:

14 Q. So when he misrepresented in his answer, it wasn't a
15 matter of fencing with defense counsel, it was just an out and
16 out misrepresentation, correct?

17 A. I don't know what was in his mind. He was certainly
18 still playing games with words.

19 Q. And some people call playing games with words a euphemism
20 for lying; isn't that right?

21 A. I don't know. Some people may. I don't know.

22 Q. Apparently, you don't.

23 MR. KANOVITZ: Objection; argumentative.

24 THE WITNESS: I --

25 THE COURT: Do you, Mr. Lieberman?

1 THE WITNESS: It depends on the circumstances.

2 BY MR. McLANDRICH:

3 Q. And at least in this circumstance, that's what you are
4 doing, right?

5 A. That's what I'm doing?

6 Q. Yes, sir.

7 MR. KANOVITZ: Objection; argumentative.

8 THE WITNESS: I don't understand.

9 THE COURT: Okay.

10 MR. McLANDRICH: Withdrawn. Thank you.

11 THE COURT: Counsel, anything?

12 MR. HERMAN: Nothing further. Thank you.

13 THE COURT: Can this witness be excused?

14 MR. KANOVITZ: Yes, Your Honor.

15 THE COURT: Mr. Lieberman, thank you very much.

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: Ladies and gentlemen, we're going to
18 recess for the lunch hour. We will reconvene at approximately
19 1:15. Please, again, don't discuss the case amongst
20 yourselves or with anyone else. Please don't formulate any
21 opinions, draw any conclusions. And we will see you back here
22 just a little bit before so we can start right at 1:15.

23 I will indicate to you also that we are trying hard to
24 possibly get if, not all, most of this presented, and we may
25 fluctuate some between 4 and 4:30 each day. So please

1 understand that. We're not -- we won't keep you by 4:30, but
2 we may go beyond what I previously indicated was our 4 o'clock
3 recess time. So please remember that. Thank you very much.

4 THE COURTROOM DEPUTY: All rise. This court stands
5 in recess.

6 (Jury out at 12:02 p.m.)

7 (Recess at 12:02 p.m.)

8 (Jury in at 1:28 p.m.)

9 (In open court at 1:29 p.m.)

10 THE COURT: We are back on the record. Counsel
11 ready to proceed?

12 MR. KANOVITZ: Yes, Your Honor.

13 MR. McLANDRICH: Yes, Your Honor.

14 MR. HERMAN: Yes, Your Honor.

15 THE COURT: Next witness -- well, I guess we have
16 Mr. Moore, right?

17 MR. McLANDRICH: Mr. Moore.

18 THE COURT: Mr. Moore, you are still under oath.

19 THE WITNESS: Yes, sir.

20 **MATTHEW SCOTT MOORE, DEFENSE'S WITNESS, PREVIOUSLY SWORN**

21 THE COURT: Counsel, you may inquire.

22 MR. McLANDRICH: Thank you, Your Honor.

23 **DIRECT EXAMINATION (CONT.)**

24 BY MR. McLANDRICH:

25 **Q.** So, Mr. Moore, Detective Moore, you were asked by

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1 plaintiff's counsel on direct whether you received the
2 complete file from the department when you were given it by
3 Mr. Fritz. Do you recall that?

4 A. Yes, sir.

5 Q. And do you believe that it was the complete file?

6 A. I had no reason to not believe it at the time.

7 Q. So what you received, which did not include any report
8 from Detective Bailey with respect to excluding Mr. Gillispie
9 as a suspect, you believed to be the complete file, correct?

10 MR. KANOVITZ: Objection to the leading and the
11 narrative.

12 THE COURT: Well, it is leading.

13 Rephrase, counsel.

14 MR. McLANDRICH: Sure.

15 BY MR. McLANDRICH:

16 Q. When you received the file, did it include any report
17 from Mr. Bailey excluding Mr. Gillispie as a suspect?

18 A. Absolutely not.

19 Q. Notwithstanding that, did you believe it to be the
20 correct -- the complete file?

21 A. Yes, I did.

22 MR. McLANDRICH: Would you pull up Plaintiff's
23 Exhibit 56.

24 I don't think there is an objection, Mike, is there?

25 MR. KANOVITZ: No objection, Judge.

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1 THE COURT: It may be.

2 (Exhibit displayed.)

3 BY MR. McLANDRICH:

4 Q. So showing you what's been marked as actually Plaintiff's
5 Exhibit 56, what are these, Detective?

6 A. This is a LEADS NCIC printout checking for -- I believe
7 it was for a criminal history check on a John Hammer.

8 Q. And what is your understanding of why this was in the
9 file?

10 A. This was a lead or tip that had been received by the --
11 by Detective Bailey.

12 Q. And is this, other than the redactions, how it existed in
13 the file when you received it?

14 A. Yes.

15 Q. And so whose name is that in the upper right-hand corner?

16 A. That would be Fritz.

17 Q. And that was on there when you received it?

18 A. Yes.

19 MR. McLANDRICH: Let's pull up the next page,
20 please.

21 (Exhibit displayed.)

22 BY MR. McLANDRICH:

23 Q. And is this a similar document?

24 A. Yes, this is the driver's record for John Hammer.

25 Q. And, again, has Detective Fritz's name in the corner?

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1 A. Yes, sir, it does.

2 THE COURT: Is that one document, Counsel? Is that
3 one exhibit?

4 MR. McLANDRICH: It's one exhibit, yes, Your Honor.
5 BY MR. McLANDRICH:

6 Q. Back in this time frame, were all the LEADS runs run from
7 a central location in the police department? In other words,
8 versus individual officers having computers and running them
9 themselves?

10 A. No, not at that time.

11 Q. So how was it done at that time?

12 A. If we needed printouts ran, we would go up to the
13 dispatch center and request dispatch run the social security
14 number and/or name or date of birth to obtain information on
15 the individuals.

16 Q. And would they then write the name of the officer on the
17 document so they knew who to route it to?

18 A. Yes, sir. Yeah.

19 Q. And is that why you believe Detective's Fritz's name is
20 up in the corner of this document?

21 A. Yes. And it's how I received documents also back then.

22 Q. And so when Mr. Lieberman received the file, he would
23 have received it in that same fashion, with Mr. Fritz's name
24 on there?

25 A. Yes, he would.

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1 MR. McLANDRICH: Next page, please.

2 (Exhibit displayed.)

3 BY MR. McLANDRICH:

4 Q. Is this another document concerning Mr. Hammer?

5 A. No.

6 Q. Who is on this one?

7 A. On this tip or lead is a Christopher A. Crooks.

8 Q. And this would have been in the file when you received
9 it?

10 A. Yes, sir.

11 MR. McLANDRICH: Next page, please.

12 (Exhibit displayed.)

13 BY MR. McLANDRICH:

14 Q. And is this another similar document?

15 A. It's similar. This is a registration check on a Roger
16 J. Griffith.

17 Q. It looks like there is a number of different Griffiths
18 because there is different initials; yes? Middle initials?

19 A. Correct. This was a general run of that name, and this
20 is all of the Roger Griffiths that came up.

21 Q. And that also bears a name in the upper right-hand
22 corner?

23 A. Yes, it does. It's Fritz.

24 MR. McLANDRICH: Next page, please.

25 (Exhibit displayed.)

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1 BY MR. McLANDRICH:

2 Q. What is this, sir?

3 A. It's another printout for a Roger Griffin.

4 MR. McLANDRICH: Next page.

5 (Exhibit displayed.)

6 BY MR. McLANDRICH:

7 Q. And what is this, sir?

8 A. This here is a registration check and a driver's
9 license check on Roger L. Griffith.

10 Q. And would these have been additional tips/leads suspects
11 that were evaluated?

12 A. Yes, sir.

13 Q. And that would have been prior to the time you took over
14 the file?

15 A. Yes, sir.

16 MR. McLANDRICH: Next page, please.

17 (Exhibit displayed.)

18 BY MR. McLANDRICH:

19 Q. And what is this?

20 A. This is a driver's license check on a Roger Griffin.

21 Q. Now, again, all these would have been evaluated before
22 you took over the file, correct?

23 A. Yes. They were in the file.

24 Q. So we've heard discussion during the various witnesses'
25 testimony about the fact that the victims described the person

1 who assaulted them indicating that the person had used the
2 name Roger and/or described himself as a security guard. Do
3 you recall that?

4 A. Yes, I do.

5 Q. So those descriptors wouldn't indicate that someone was,
6 in fact, the suspect, right?

7 A. They are just points that were made by the suspect at
8 the time.

9 Q. And, likewise, they wouldn't exclude someone from being
10 the suspect, right?

11 A. That's true.

12 Q. So the mere fact that someone's actual name was Roger
13 wouldn't be evidence that they weren't the perpetrator,
14 correct?

15 A. That's correct.

16 Q. And the fact that they were actually a security guard
17 wouldn't be something that would exclude them from the
18 possibility of being the suspect, correct?

19 A. Right.

20 Q. You have heard a good bit of testimony, as well, about
21 the hair color of the suspect and the different descriptions
22 from the three victims, correct?

23 A. Yes, sir.

24 Q. And there's been testimony that S.C., her descriptor was
25 blondish, and one of the -- either B.W. or C.W., I forget

1 which, had brownish-red and the other had orangish-brown. Do
2 you recall that?

3 A. That's correct.

4 MR. KANOVITZ: Objection. Well, sorry. I withdraw.
5 BY MR. McLANDRICH:

6 Q. And these three descriptions of the hair color are not
7 the same, correct?

8 A. No, they're not. They are various.

9 Q. And so in your experience, do witnesses or victims
10 sometimes have descriptions that are imprecise?

11 A. Yes, they do.

12 Q. And with these three different descriptions of the hair,
13 did you know the actual hair color of the suspect?

14 A. No.

15 Q. And so when you were asked previously about why you would
16 conduct a photo array with Mr. Gillispie, who had brown hair
17 of some shade or another, as opposed to these three
18 descriptions, why was it that you felt it was appropriate to
19 perform a photo array with Mr. Gillispie if his hair wasn't
20 orangish-blond or orangish-brown or reddish -- brownish-red or
21 blondish?

22 A. Well, at the time all I had was the photo from the work
23 ID. Granted, from what we saw here on display, that ID was
24 taken in January. That's during the winter months, and
25 that's also when your hair would tend to be darker, versus

1 as in August, July, August, or September, when people tend
2 to be outside, their hair tends to lighten and they tend to
3 tan.

4 Q. And can a given hair color appear different under
5 different conditions?

6 A. Yes, sir. Depending on the lighting conditions, you
7 could have that. You also could end up being under stress
8 at that point.

9 Q. Now, you were asked questions on direct with respect to
10 an interview with Mr. Gillispie where you asked him certain
11 questions and with respect to whether he smoked or with
12 respect to whether he was molested, with respect to his
13 whereabouts on the dates in question, things such as that. Do
14 you recall that?

15 A. I believe that was on August 8th, on 8-8, of 1990.

16 Q. Have you ever known a suspect in a case when you were
17 interviewing them to lie to you?

18 A. Many times.

19 Q. And is it the habit of people who are being -- who have
20 engaged in a crime and are now being investigated for a crime
21 to not want to admit to it?

22 A. Yes, sir.

23 Q. And to give answers in an interview that are meant to
24 avoid culpability and essentially not implicate themselves?

25 A. I had that many times during my career.

1 **Q.** So when Mr. Gillispie was being interviewed by you, you
2 had already performed the photo arrays with B.W. and C.W.,
3 correct?

4 **A.** That would be correct.

5 **Q.** And so at that time, based on what you knew, you believed
6 you had probable cause to both -- to believe that
7 Mr. Gillispie was the perpetrator based on those
8 identifications; is that correct?

9 MR. KANOVITZ: Objection; leading.

10 THE COURT: Sustained as to the probable cause. It
11 will be stricken.

12 BY MR. McLANDRICH:

13 **Q.** All right. By the time you interviewed Mr. Gillispie,
14 you had already performed the photo arrays with B.W. and C.W.,
15 correct?

16 **A.** Prior to the interview, yes.

17 **Q.** Yes. And each of them had made an identification during
18 that photo array presentation?

19 **A.** Yes, they had.

20 **Q.** And each of them had identified Mr. Gillispie as their
21 assailant?

22 **A.** Yes, they had.

23 **Q.** And so did that affect how you interpreted
24 Mr. Gillispie's answers when he gave you denials to the
25 questions that you were asking him in the interview?

1 **A.** Well, knowing that suspects tend not to admit to
2 things, I at that -- I had felt after asking several
3 questions that -- and the responses -- that the interview
4 was going to most likely not produce facts that would
5 actually relate at the time. His answers. And so I didn't
6 expect him to tell me the truth.

7 **Q.** Now, the theory in the case always was, and still is,
8 that all three women were assaulted by the same person; is
9 that true?

10 **A.** That's true.

11 **Q.** And what would that have been based upon?

12 **A.** Well, it would be based on several factors. For me,
13 the first thing was when I initially got the composite and
14 the work ID. I felt that there was similarities at that
15 time.

16 **Q.** I'm sorry. I am asking you about why the police would
17 have believed that all three women were assaulted by the same
18 person. What factors led the police to believe that?

19 **A.** Well, the suspect in a case used the name of Roger in
20 both the incidents. He identified as being security in both
21 the incidents. And in both incidents there was a
22 description of a weapon. And at this point I don't remember
23 the other items, but there were similar circumstances and
24 descriptors within both incidents that would lead you to
25 believe that those incidents are related.

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1 Q. All right. And notwithstanding that these were all
2 supposedly the same person -- and certainly B.W. and C.W. were
3 together at the time of their assault?

4 A. Yes, they were.

5 Q. And notwithstanding that, are their descriptions exactly
6 the same?

7 A. No.

8 Q. You were asked during your direct testimony about the
9 photo array. Do you recall those questions?

10 A. I know I've been asked about photo array.

11 Q. All right. And one of the questions related to the
12 background color of the various photos used. Do you recall
13 that?

14 A. Yes, sir.

15 Q. All right. And you were asked about whether you could
16 have blocked out all the background around the faces.

17 A. Yes, sir.

18 Q. Could you have done that?

19 A. I guess I could have, but I had never, ever seen that.

20 Q. And how could you have done that?

21 A. I guess you would have to --

22 THE COURT: Do you know how to do that?

23 THE WITNESS: I don't really know how you would
24 actually end up doing that, but --

25 BY MR. McLANDRICH:

1 Q. All right. So at that time, there wasn't any particular
2 ability to Photoshop or things that could be done today to do
3 that?

4 A. I had never seen that done.

5 Q. When you made up the photo arrays, what was your focus in
6 selecting the fillers to go along with the suspect?

7 A. Well, obviously, I was trying to find white
8 individuals, was trying to find male individuals. I was
9 trying to find individuals that had brown hair, individuals
10 that had mustaches, and individuals that had similar face
11 shape. Not exactly, but close to it.

12 Q. And you were asked questions also about the types of
13 photos that were used, the different characteristics of the
14 finish of the photos?

15 A. Yes, sir.

16 Q. Had you ever seen other photo arrays prepared at the
17 Miami Township Police Department that had similar
18 characteristics to the array that you prepared?

19 A. Yes, back then you saw that quite a bit.

20 Q. And did you see any such photo arrays with those
21 characteristics prepared by Mr. Fritz?

22 A. I had in the past.

23 Q. Had Mr. Fritz ever provided you any training with respect
24 to how to prepare a photo array?

25 A. No, he did not.

1 Q. Had anyone else at the Miami Township Police Department
2 provided you any training on how to prepare a photo array?

3 A. Not that I remember at all.

4 Q. Did you make any changes to the photo array from
5 suspect -- I'm sorry -- from witness to witness? In other
6 words, when you showed it to B.W. to C.W. to S.C., had you
7 made any changes to it?

8 A. Yes, I did.

9 Q. And what changes did you make?

10 A. For each individual that I showed the photo lineup to,
11 for security reasons, I swapped Mr. Gillispie's photo image
12 out and placed it behind a different window, specifically
13 doing that because if I have twin girls and them being
14 related, there is a potential for them talking. Even though
15 I have given instructions that you are not to talk about
16 this at the time, I felt that it was -- probably be in my
17 best interest and for security to swap the photo image of
18 Mr. Gillispie to a different window after it initially was
19 shown to C.W.

20 MR. McLANDRICH: I'd like to show the witness
21 Defense Exhibit 19. It's probably just a different copy of
22 something that's been displayed before. It's the instruction
23 sheet for the arrays.

24 MR. KANOVITZ: No objection, Judge.

25 THE COURT: It may be published.

1 (Exhibit displayed.)

2 BY MR. McLANDRICH:

3 Q. Showing what's been marked as Defendant's Exhibit 19,
4 what is this document, please?

5 A. This is the photographic identification general
6 guidelines.

7 Q. And to your knowledge, are there any other policies,
8 procedures, or documents that told the police officer at Miami
9 Township Police Department in 1990 how to prepare or display a
10 photo array?

11 A. This is the only document I know of.

12 Q. And the top half, are those guidelines directed to the
13 officer about preparation of the array?

14 A. They are general guidelines, yes.

15 Q. And then the bottom half, are those the instructions for
16 the witness when you are performing the array?

17 A. Yes, they are. That is the photographic showup
18 instructions that are read to the witness, and they are read
19 verbatim, word for word.

20 Q. Would you please read those instructions for the record.

21 A. It says, "I am going to show you a group of
22 photographs. This group of photographs may or may not
23 contain a picture of the person who committed the crime now
24 being investigated. Keep in mind that hairstyles, beards,
25 and mustaches may be easily changed. Also, photographs may

1 not always depict the true complexion of a person. It may
2 be lighter or darker than shown in the photo. Pay no
3 attention to any markings or numbers that may appear on the
4 photos or any other differences in the type or style of the
5 photographs. When you have looked at all the photos, tell
6 me whether or not you see the person who committed the
7 crime. Do not tell other witnesses that you have or have
8 not identified anyone."

9 Q. And in these instructions that you read to the witness,
10 does it discuss the possibility of a change in appearance by
11 the suspect between the time of the crime and the time of the
12 presentation of the array?

13 A. It does talk about that.

14 Q. And it makes reference to several specific items in that
15 regard, correct?

16 A. Yes, it does.

17 Q. And what might those be?

18 A. It talks about hairstyles, styles, beards, and
19 mustaches, and then it also talks about complexion.

20 Q. And, again, is this because it's possible that a suspect
21 may want to change their appearance to avoid detection?

22 A. Yes, sir.

23 Q. And tell me about the process that you went through with
24 each of the victims when you presented the photo array to
25 them. What did you do?

1 MR. KANOVITZ: Objection; compound.

2 MR. McLANDRICH: I can rephrase it.

3 THE COURT: Just deal with what you want. If there
4 is an objection, we can deal with it separately. Thank you.

5 BY MR. McLANDRICH:

6 Q. Please describe your conduct when you displayed the photo
7 array to each of the victims.

8 A. First of all, I would have them -- I would escort them
9 from the lobby of the police department, take them back to
10 the office, have them have a seat. I would read the
11 photographic lineup instructions to the individuals, and the
12 photo lineup would be face down. I would ask them if they
13 understood the instructions, and then I would have them
14 sign, date, and time that instruction sheet.

15 Then I would flip over the photo lineup, present it to
16 them. They would review the photo lineup, and they would
17 make whatever comments that they were going to make at the
18 time. Those would be documented on the fact sheet. And
19 they would tell me whether or not they did or did not see
20 the individual that had committed the crime against them.

21 Q. And we've heard some testimony in this case about a
22 high-confidence identification under pristine conditions. Do
23 you recall that testimony?

24 A. Yes.

25 Q. Were you ever trained on such a thing by Miami Township?

1 **A.** I have no idea. I mean, I know that I wasn't trained
2 on it, but during that period of time, things were very
3 different.

4 **Q.** That was not a concept that was familiar to you at that
5 time?

6 **A.** No.

7 **Q.** And how about this concept of latency in the
8 identification? Was that a concept that was known to you at
9 that time?

10 **A.** What do you mean by "latency"?

11 **Q.** The time lapse between the array being turned over and
12 the time that the person actually picked someone out of the
13 array, is that a concept that you were trained on by Miami
14 Township?

15 **A.** Just to make sure, you're talking about from the time
16 it's shown to the time that it ends with them?

17 **Q.** Yes.

18 **A.** You are not talking about the time when the incidents
19 starts to the time later on when the photo lineup is shown?

20 **Q.** No, sir.

21 **A.** I was never trained on that.

22 **Q.** Was it even a concept that was in the police dialog with
23 you at that time?

24 **A.** No. It's just how I did the lineups.

25 **Q.** Do you recall when Mr. Gillispie's name first surfaced

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1 during this investigation?

2 A. When his name first came --

3 Q. To your attention?

4 A. -- to my attention?

5 Q. Yes, sir.

6 A. Would have been on April 19th of 1990.

7 Q. And how do you know that's the date?

8 A. Well, I had reviewed my transcript from the grand jury,
9 and in there, there was information in which at the time we
10 were able to relate it to the printouts of Mr. Gillispie.

11 Q. Do you mean grand jury, or do you mean the criminal
12 trial?

13 A. Well, we -- actually, it was the criminal trial. It
14 was trial number one.

15 Q. And then what did you do with that photograph or
16 photographs that were brought to you by Mr. Wolfe?

17 A. Well, they had been shown to me in the office and
18 handed to me by Wolfe, and I ended up giving those back to
19 Steve Fritz, and those went into the file.

20 Q. And were you the assigned investigator on the case when
21 that happened?

22 A. No, I wasn't.

23 Q. And how much later was it before you became the assigned
24 investigator?

25 A. Well, from April 19th, I get the case given to me by

1 Steve Fritz on June 15th of 1990.

2 Q. And why was it given to you on that date?

3 A. That was when Steve Fritz was leaving our department --
4 employment at our department.

5 Q. And I believe we reviewed this during the portion of your
6 direct the other week. When did Mr. Bailey leave the
7 detective section?

8 A. He had left November 5th of 1989, and I came into the
9 detective section on that day.

10 Q. All right. And so by the time Mr. Wolfe had delivered
11 these IDs to you, Mr. Bailey was no longer in the department?

12 A. No. He had been out of the detective section for
13 months.

14 Q. And before you became the investigator -- strike that.

15 When you started to investigate any relationship
16 Mr. Gillispie might have to the crimes, what was your next
17 step to try and determine whether, in fact, Mr. Gillispie had
18 a relationship to the crimes?

19 A. Starting from what point?

20 Q. So just to put it in a time frame, Mr. Fritz has left.
21 You have been given the investigation. I think we reviewed
22 last time that you went through the various reports. And once
23 you had done that, you started to investigate the matter.

24 A. Well, I went through the -- initially, when I was given
25 the case on the 15th, I just placed it in my drawer and did

1 nothing with it. And that was because I had other cases
2 going.

3 On June 18th, I pulled a file from my drawer, and I go
4 through the file and review the file as to what documents
5 are in that file.

6 **Q.** Yes. And once you had done that and now you are starting
7 to try to ascertain whether or not Mr. Gillispie is, in fact,
8 a legitimate suspect or perhaps the perpetrator, what actions
9 did you take? How did you go about that?

10 **A.** Well, once I reviewed the report, you know, initially,
11 I had been given a composite and the GM work ID card. I
12 felt that there was a similarity between the image of
13 Mr. Gillispie and that composite.

14 **Q.** Did you call Mr. Gillispie?

15 **A.** Not at that point.

16 **Q.** Did there come a time when you tried to call
17 Mr. Gillispie?

18 **A.** Yes.

19 **Q.** And were you able to initially reach him?

20 **A.** Well, my initial -- on the initial call, and I believe
21 that was on June 19th of 1990, I initially talked with his
22 sister. And then seven minutes later, I got a telephone
23 call back from Mr. Gillispie.

24 **Q.** And what did you discuss with Mr. Gillispie during that
25 call?

1 **A.** At that point, I was trying to set up a meeting with
2 him to have him come out to the police department.

3 **Q.** And were you successful during that call?

4 **A.** No.

5 **Q.** And what did he tell you in response to your request to
6 set up a call?

7 **A.** Well, initially, we got it narrowed down to where I was
8 trying to get him within a three-day span, and then it ended
9 up going to, well, I'm going to be busy for the next two
10 weeks, and eventually ends up hanging up on me.

11 **Q.** All right. What was the next investigative action that
12 you took with respect to trying to confirm or refute his
13 status as a suspect?

14 Did you try to ascertain where Mr. Gillispie was on the
15 dates of the offense?

16 **A.** Yes, I did.

17 **Q.** And how did you go about that?

18 **A.** Well, I at one point ended up requesting work
19 schedules. Now, I had been told initially that
20 Mr. Gillispie had not worked on August 20th or August 21st.
21 So I knew that he had not worked during that period of time.

22 **Q.** What did you find out about August 5th?

23 **A.** Later on, I will find out on August 5th that -- and I
24 believe that was after -- sometime after August, late August
25 that he did not work on the 5th.

1 Q. And I believe we talked about this in your direct
2 previously. Did you have any DNA evidence?

3 A. There was no DNA evidence.

4 Q. Did you have any useful fingerprint evidence?

5 A. There was no latent prints on the sunglasses and/or
6 photograph.

7 Q. And so as I think we heard Mr. Lieberman testify, this
8 was going to be an eyewitness identification case?

9 A. That was known right from the very beginning, yes.

10 Q. What actions did you take with respect to the GM
11 identification photograph relative to a photo array?

12 A. I believe that it was on June 21st I forwarded the GM
13 work ID card to the Miami Valley Regional Crime Lab, and I
14 made a request that they make me photos from that work ID.

15 MR. McLANDRICH: I'd like to show the witness
16 Defendant's Exhibit 32.

17 MR. KANOVITZ: No objection, Judge.

18 THE COURT: It may be.

19 (Exhibit displayed.)

20 MR. HERMAN: No objection.

21 BY MR. McLANDRICH:

22 Q. Detective Moore, what is this document?

23 MR. McLANDRICH: Can you enlarge it slightly, Jeff.

24 THE WITNESS: This is the front -- this is the front
25 of the page for a request to have a photo made from the work

1 ID that had been sent to Miami Valley Regional Crime
2 Laboratory, filled out by me, and it's a standard document
3 used at Miami Township.

4 MR. McLANDRICH: And would you go to the next page,
5 please.

6 (Exhibit displayed.)

7 BY MR. McLANDRICH:

8 Q. And then this is what, sir?

9 A. This here would be the back of that page, listing the
10 evidence, which was the GM security ID card.

11 Q. Okay. And the top is for what purpose, sir?

12 A. To give a basic narrative of what I need it for. Or
13 the incident at hand.

14 Q. Sure. And did you receive then a photograph back from
15 the crime lab?

16 A. I did receive photograph back from the crime lab.

17 Q. And was it suitable?

18 A. No, it wasn't.

19 MR. McLANDRICH: I'd like to show Defendant's
20 Exhibit 33, please.

21 THE COURT: Has that been shown before?

22 MR. KANOVITZ: I don't believe it's been shown, but
23 no objection.

24 THE COURT: Counsel, any objection?

25 MR. HERMAN: No.

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1 THE COURT: All right.

2 BY MR. McLANDRICH:

3 Q. And what is this document, sir?

4 A. This is another Miami Valley Regional Crime Lab report
5 that -- or request form that I filled out.

6 Q. And why was this request form filled out?

7 A. This was filled out because I needed a smaller version
8 of the photo that they had originally made and sent to me,
9 and I needed that smaller version to be used in a photo
10 lineup.

11 Q. Did you tell the crime lab how big or small to make the
12 head of Mr. Gillispie?

13 A. Yes, I did.

14 Q. And what did you ask in that regard?

15 A. It says, "I need a smaller version of this suspect's
16 head. The picture you sent back last will not fit in a
17 photo lineup" - I believe that's "folder."

18 MR. McLANDRICH: And let's go to the second page,
19 please.

20 (Exhibit displayed.)

21 THE WITNESS: This is the reverse side of that page.

22 MR. McLANDRICH: Could you make it a little bit
23 bigger, Jeff.

24 BY MR. McLANDRICH:

25 Q. Did you return the original to them? That they had sent

1 you the first time?

2 **A.** Yes, sir.

3 **Q.** And --

4 **A.** I also sent the negatives.

5 **Q.** And the request then was for what, sir?

6 **A.** I was requesting a smaller version of the picture.

7 **Q.** And then --

8 MR. McLANDRICH: Scroll down if you would, Jeff.

9 BY MR. McLANDRICH:

10 **Q.** What is the -- what is the purpose of that box on the
11 page?

12 **A.** I had drawn a sample square. I had used the photo
13 lineup plastic case, and I drew a square on it to show them
14 the in-general size of what I was needing a photo to fit in.

15 **Q.** All right. And the photo that you got back was -- was
16 that the one you ended up using in the array?

17 **A.** Yes, sir.

18 MR. McLANDRICH: I'd like to go back to Defendant's
19 18, please.

20 Let's go to the second page, please.

21 (Exhibit displayed.)

22 MR. McLANDRICH: I'm sorry. Let's go to the first
23 page for a moment, please.

24 (Exhibit displayed.)

25 BY MR. McLANDRICH:

1 Q. So on the first page, which of the victims was this array
2 with respect to?

3 A. On 7-16, I believe that was Connie -- or C.W.

4 MR. McLANDRICH: Going to the next page, please.

5 (Exhibit displayed.)

6 BY MR. McLANDRICH:

7 Q. And then describe how this sheet was utilized during the
8 presentation of the photo array.

9 A. Well, this actually is a photo lineup fact sheet. This
10 is just where I identify the individuals that are going to
11 be placed behind the window by number. And then it has a
12 place for the photo number in which the witness identifies.
13 And then it has remarks in which the witness would have made
14 at the time of showing.

15 Q. Is the top portion filled out ahead of time?

16 A. Yes, it is.

17 Q. And then the bottom portion is utilized during the
18 presentation itself?

19 A. Yes.

20 Q. And so I believe you had previously testified on cross
21 that after you read the instructions which we reviewed from
22 the first page of Exhibit 18, you then turned over the photo
23 array, correct?

24 A. Correct.

25 Q. All right. And then tell me what would have -- what

1 occurred from there relative to this document.

2 A. Well, the individual would review it, make a photo
3 selection. I would write down that photo selection that
4 they identified and then anything that they said at that
5 time.

6 Q. And did C.W., in fact, do what you have just described?

7 A. Yes.

8 Q. Okay. And then did you then record onto this document
9 those events?

10 A. Well, I did, but I'm thinking that the fact sheet here,
11 it may be for one of the other girls. I'm not sure. 'Cause
12 this has photo selected, Number 2.

13 Q. Do you think it got switched with B.W.?

14 A. Yes, I think so. 'Cause I -- I mean, without seeing my
15 report, but I believe that 6 was C.W., 2 was B.W., and 5 was
16 S.C.

17 Q. I'm looking at your report, and it looks like C.W. picks
18 Number 2.

19 A. Okay. Then that is C.W.'s.

20 Q. And, now, with respect to C.W., would you read under
21 "Remarks" what you have written there?

22 A. It says, "Number 2. That's him. His face is full.
23 The hair looks the same. His build is about right. I'm
24 about 90 percent sure. He looks better than the composite
25 you guys put out. It's him."

1 Q. Had you previously said something to C.W. about a hundred
2 percent before she made her selection?

3 A. Yes, I had.

4 Q. Tell us about that.

5 A. I don't remember all of the exact words, but I know
6 that I told her prior to showing the photo lineup that I
7 needed her to be 100 percent sure, which at that time,
8 hindsight, that was a mistake. And that was a mistake
9 because now I've put pressure on her --

10 THE COURT: Counsel, I think the question has been
11 answered.

12 BY MR. McLANDRICH:

13 Q. And did she have a reaction to you telling her she had to
14 be a hundred percent certain?

15 A. Well, she was identifying with an image, and I could
16 see that by her tracking with her eyes on that image. I
17 think that this did put pressure on her at that time, undue
18 pressure, and she did end up making an identification.

19 Q. All right. And when she made the identification, did she
20 make the remarks that you recorded on this fact sheet?

21 A. Yes, sir.

22 Q. And did you, in fact, record in your report this issue of
23 telling her about being a hundred percent sure?

24 A. Yes, sir.

25 Q. So you weren't trying to conceal that from anyone?

1 A. Absolutely not.

2 Q. And, likewise, recorded the statements that are reflected
3 on this sheet?

4 A. Yes, sir.

5 Q. And did you put those statements into your report as
6 well?

7 A. I believe so.

8 Q. Did you perform a similar procedure with B.W.?

9 A. Yes, I did.

10 MR. McLANDRICH: Can we have DX19.

11 THE COURT: That's been previously published?

12 MR. McLANDRICH: I think it may well have been. I
13 mean, their version.

14 Let me just show it to him real quick. I apologize, Your
15 Honor.

16 MR. KANOVITZ: No objection.

17 THE COURT: Counsel, have you seen it?

18 MR. HERMAN: No objection.

19 THE COURT: It can be published.

20 (Exhibit displayed.)

21 BY MR. McLANDRICH:

22 Q. Showing you what's been marked as Defendant's Exhibit 19,
23 is this the document, the copy of the instructions with
24 respect to B.W.?

25 A. Yes, it is.

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1 Q. And what's the date on this document?

2 A. July 17, 1990.

3 Q. And what's the timing of that in relation to B.W.? From
4 date.

5 A. Oh, from C.W. to B.W.?

6 Q. Yes, sir.

7 A. C.W. I saw on the 16th of July, and B.W. would have
8 been on the 17th of July, the day.

9 Q. And why is it that they weren't done at the same time on
10 the same day?

11 A. I don't remember exactly. I think it had something to
12 do with work for one of the girls, or for B.C. [sic].

13 Q. Now, when someone's asked to come down and view a photo
14 array, do they know why they are coming down?

15 A. Well, they would know that they are coming to look at
16 some pictures.

17 Q. And do they know what the purpose of looking at pictures
18 is?

19 A. I would have to say that most likely, yes.

20 Q. Is it your -- well, let me ask it this way: Do you know
21 whether B.W. and C.W. looked at any books of photographs prior
22 to your involvement with the investigation?

23 A. I don't know that, no.

24 MR. McLANDRICH: All right. Let's go to the second
25 page, please.

1 (Exhibit displayed.)

2 BY MR. McLANDRICH:

3 Q. Is this the fact sheet for B.W.?

4 A. Yes, it is.

5 Q. And did she, in fact, make this selection?

6 A. Yes, sir, she did, Number 6.

7 Q. And that's in contrast to the Number 2 that C.W.
8 selected?

9 A. Yes, it is.

10 Q. But those are both photographs of Mr. Gillispie?

11 A. Yes, they are.

12 Q. And what did you record under "Remarks"?

13 A. "It's him, Number 6."

14 Q. And is that what she told you on that date?

15 A. Yes, sir.

16 Q. Subsequent to these identifications, were you able to
17 arrange an interview with Mr. Gillispie?

18 A. I believe that he ended up coming in on August 8, 1990.

19 Q. And that's when you had the dialog with him that we
20 discussed earlier, where you asked him the various questions
21 about smoking and so forth and so on?

22 A. Yes, sir.

23 Q. And then subsequent to that interview, did you have an
24 occasion to present an array to S.C.?

25 A. Yes, I did.

1 MR. McLANDRICH: I'd like to show Defendant's 22.
2 It's just the S.C. version of the same documents.

3 MR. KANOVITZ: No objection.

4 MR. HERMAN: No objection.

5 THE COURT: It may be.

6 (Exhibit displayed.)

7 BY MR. McLANDRICH:

8 Q. Showing Defendant's Exhibit 22, this is another copy of
9 the instructions, but this one for S.C.?

10 A. Yes, sir.

11 Q. And the date on this document?

12 A. Is 8-28 of 1990.

13 Q. And would you have read the same instructions that are at
14 the bottom?

15 A. Yes, sir, I would have, verbatim.

16 MR. McLANDRICH: Turning to the next page, please.

17 (Exhibit displayed.)

18 BY MR. McLANDRICH:

19 Q. This fact sheet relates to S.C.?

20 A. Yes, it does.

21 Q. And did she make a photo selection?

22 A. Yes, she did.

23 THE COURT: Can counsel approach, please.

24 (At sidebar off the record.)

25 THE COURT: Ladies and gentlemen, we're going to

1 take a break. Let's maybe about a ten-minute break, but ten
2 to fifteen minutes, and then we will get back on the record.
3 Please remember the Court's admonitions. Thank you.

4 THE COURTROOM DEPUTY: All rise. This court stands
5 in recess.

6 (Jury out at 2:23 p.m.)

7 (Recess at 2:23 p.m.)

8 (Jury in at 2:39 p.m.)

9 (In open court at 2:39 p.m.)

10 THE COURT: We are back on the record.
11 Counsel ready to proceed?

12 MR. McLANDRICH: Yes, sir, Your Honor.

13 THE COURT: You may inquire.

14 MR. McLANDRICH: If I could have the document
15 viewer, please. It's the same document, just a different
16 copy.

17 THE COURT: All right.

18 (Exhibit displayed.)

19 BY MR. McLANDRICH:

20 **Q.** Detective, this is page 2 of the exhibit we were looking
21 at previously, and this has the "Remarks" section. Would you
22 just tell us what S.C. put in the "Remarks" section, please.

23 **A.** I wrote this as she was saying this. "I'm looking at
24 this one, pointing at Number 5, but the hair was lighter.
25 The face is right. I need light. Can I go outside and look

1 at this? Do you have any other photographs of him? It's
2 Number 5. Yeah, it's Number 5. I never thought I would see
3 him again. I will testify if needed."

4 Q. And so some of those comments sounds like they were made
5 inside and some of them sound like they were made outside; is
6 that correct?

7 A. That would be correct.

8 Q. And which portion is which?

9 A. Well, when she says, "I'm looking at this one, pointing
10 at Number 5, but the hair was lighter and the face is
11 right," and that's -- at that point is then when she asked
12 to go outside, and we did go outside.

13 Q. And so the comments about needing lighting, going
14 outside, that would have also been inside?

15 A. Well, it says, "I need light. Can I go outside and
16 look at this?" So, yes.

17 Q. And then is the remainder inside or outside?

18 A. Outside, on the front porch.

19 Q. Thank you. Now, I'd like to ask you about the alibis
20 that Mr. Gillispie described to you. Do you recall asking
21 Mr. Gillispie whether he had any alibis?

22 A. I know that I had asked that.

23 Q. And do you recall what he told you in that regard?

24 A. Independently, no. I know that there was a statement
25 about being at the campgrounds for 32 straight weekends in a

1 row.

2 Q. And did you try to investigate whether Mr. Gillispie was,
3 in fact, at the campground on the dates in question?

4 A. I did. I would need to do so in order to either prove
5 or disprove that alibi.

6 Q. And what did you do in an effort to either prove or
7 disprove that alibi?

8 A. I made contact with the Twin Knobs campground, talked
9 with a lady by the name of Laura.

10 Q. And after you talked to Laura, what did you learn?

11 A. That she informed me that they only keep records for 30
12 days, and then everything is sent to Winchester, Kentucky.
13 And that I should contact a gentleman by the name of Bob --
14 Bob Strossnyder.

15 Q. And did you contact that person?

16 A. I did contact him.

17 Q. And what did you learn from him?

18 A. That he did not have records for 1988, and he told me
19 to contact Fred Mariott.

20 Q. And how did you contact Mr. Mariott?

21 A. With a telephone number provided by Bob Strossnyder.

22 Q. And what did you discuss with Mr. Mariott?

23 A. I told him that I needed to check to see if he could
24 check receipts for the names of Roger Gillispie and Jerry
25 Fyffe to see if he could locate campground receipts or

1 cards, I believe for the months -- month of August.

2 Q. And did you receive any?

3 A. I did receive some cards, yes.

4 Q. How did you receive them?

5 A. I received those cards through the mail.

6 Q. And did you preserve those cards?

7 A. Yes, I did.

8 Q. Did you also preserve the envelope they came in?

9 A. Yes, I did.

10 Q. Did you supply all that to Mr. Folfas?

11 A. I provided that to both prosecution and defense in the
12 form of copies of those, and it was placed in their files.

13 Q. Did you ever go to Kentucky in person to look for
14 campground receipts.

15 A. I have never been to Kentucky to Cave Lake or to Twin
16 Knobs campgrounds.

17 MR. McLANDRICH: I'd like to show Defendant's 28,
18 which are the police reports.

19 THE COURT: Have those been published?

20 MR. McLANDRICH: I don't think they have, but we
21 discussed those.

22 MR. KANOVITZ: What are those?

23 MR. McLANDRICH: The supplements, his supplements.

24 MR. KANOVITZ: No objection.

25 MR. HERMAN: No objection.

1 THE COURT: They may be.

2 MR. McLANDRICH: It may have been published last
3 week, but my memory is weak.

4 (Exhibit displayed.)

5 BY MR. McLANDRICH:

6 Q. I want to move through some of this fairly quickly to get
7 to the part that I'm particularly interested in, but since we
8 have it up.

9 So on 6-18, briefly, would you tell me what the purpose
10 of that entry is?

11 A. This is placing a header onto the start of my
12 investigative supplementary report or investigation. It
13 also lists the start of or the synopsis of the facts of the
14 case from documents that had previously been provided from
15 Detective Fritz and Bailey's reports.

16 Q. Would you just read the first paragraph into the record,
17 please.

18 A. "On 6-18-90, Monday, I, Detective M.S. Moore, was
19 assigned a rape, abduction, ag robbery case involving twin
20 sisters, being C.W. and B.W. The reason for this case being
21 assigned to this detective was due to Detective-Sergeant
22 Fritz discontinuing his employment with Miami Township
23 Police Department. Due to new information received in this
24 case, I will be continuing the investigation. For past
25 details involving this case, see older report forms. The

1 case printed on this computer printout will be starting with
2 Detective M.S. Moore's investigation only, starting where
3 Detective-Sergeant Fritz and Detective G. Bailey left off."

4 Q. Now, with respect to that paragraph, what's the -- what's
5 the new information that's causing you to continue work on the
6 file?

7 A. The new information was the -- information had been
8 brought forth concerning Roger Gillispie.

9 Q. And when you refer to the older report forms, what were
10 the forms of the older reports as opposed to what you are
11 doing here?

12 A. Well, the old report forms became antiquated, and they
13 had installed a new computer system within the police
14 department to where we now could enter reports on the
15 computer.

16 Q. And were the old forms on a separate computer system or
17 were they hard copy?

18 A. They were hard copy, paper form, in cabinets.

19 Q. And as you've already testified, you got what you thought
20 was the complete file; yes?

21 A. Yes, sir.

22 Q. Skipping through your synopsis, then at the bottom of the
23 third page, the entry of 6-19-90, just generally, what's that
24 entry about? It's the bottom of the second page.

25 A. Okay. So --

1 MR. McLANDRICH: And you are going to have to give
2 him the third page, as well, for it to mean anything.

3 (Exhibit displayed).

4 THE WITNESS: Which part are you asking about here?
5 BY MR. McLANDRICH:

6 **Q.** I'm asking about the entry on 6-19-90. What step were
7 you taking in your investigation at that point?

8 **A.** At that -- at that point, I'm trying to get hold of
9 Roger Gillispie to have him come to the police department.

10 **Q.** All right. And that first call, is that the one where
11 you speak to the sister?

12 **A.** Yes, it is.

13 **Q.** All right. And then you have a second entry on 6-19.
14 What's the basic substance of that?

15 MR. McLANDRICH: Why don't you make that a little
16 bit bigger so he can read it, Jeff.

17 BY MR. McLANDRICH:

18 **Q.** Go ahead, sir.

19 **A.** It's a second call that I received seven minutes later,
20 after talking with the sister, from Roger Gillispie, and it
21 was us trying to get together on a meeting to have him come
22 to the police department. And --

23 **Q.** I -- go ahead.

24 **A.** Go ahead.

25 **Q.** This is the one basically where he tells you, "I'm busy.

1 Maybe in a couple weeks," and the phone call's discontinued
2 cause he hangs up?

3 A. Yes, sir.

4 Q. Let's go to the bottom of that page, the entry on 6-21.
5 That's your initial effort to get a larger copy of the ID
6 badge?

7 A. Yes, it is.

8 Q. Let's progress to the next entry on 7-7. Here you end up
9 speaking with Mrs. Gillispie, his mother?

10 A. Yes, I did.

11 Q. And what, just -- what kind of -- what were you trying to
12 obtain there? What was the effort being made there?

13 A. Well, I was trying to make contact with Roger Gillispie
14 to have him come out to the police department, since our
15 other call just didn't go quite well.

16 Q. And then moving ahead to 7-16, what is this segment of
17 your report describing?

18 A. This would describe the circumstances in which I showed
19 the photo lineup to C.W.

20 Q. And does it contain the dialog we had earlier about the a
21 hundred percent and then the 90 percent?

22 A. Yes, it does.

23 Q. Then the 7-17 entry, does that relate to Bonnie? I'm
24 sorry -- B.W.?

25 A. It does relate to B.W.

1 Q. And what happens in the next entry on 8-8?

2 A. This is when Roger Gillispie came to the police
3 department, only after he had spoken with an attorney now.

4 Q. And this is the -- this is the portion of the
5 investigation where you have the interview where you asked him
6 the various questions about smoking or drinking beer or family
7 problems and so forth?

8 A. Yes, it is.

9 Q. The entry on 8-27-90, does this relate to the photo array
10 with S.C.?

11 A. This was my call to her to set up a meeting.

12 Q. All right. And you are telling her what in this dialog?

13 A. Do you want me to read the paragraphs?

14 Q. No. Just read it to yourself, and then give us the
15 substance.

16 A. Okay.

17 Q. And what was the purpose of this entry?

18 A. Well, this entry was to detail the fact that I had
19 called her, was trying to set a meeting with her. I also
20 knew at that time that back when the incident occurred she
21 had been under a lot of stress. There had been some
22 difficulties between her and her husband. And I asked her
23 if she'd be willing to look over a photo lineup, and she
24 agreed to do so.

25 Q. Notwithstanding the marital problems she was having?

1 A. Yes. But at that point, we're dealing in -- she had
2 time to -- for everything to get worked out.

3 Q. And did she express any confidence in her ability that
4 she would recognize the suspect?

5 A. Yes, she did. Do you want me to expand on that?

6 THE COURT: No. I think you've answered the
7 question.

8 THE WITNESS: Okay.

9 BY MR. McLANDRICH:

10 Q. And then the next entry on 8-28, is that where you
11 actually presented the array to her?

12 A. Yes, sir, it is.

13 Q. And it reflects the dialog we've already discussed about
14 that?

15 A. Yes, sir, it does.

16 Q. What else happened on the 28th? The bottom of the page,
17 please.

18 A. After meeting with S.C., I then go back to the police
19 department and I contacted Rick Wolfe.

20 Q. And what was the purpose for that?

21 A. Was to verify as to whether or not Roger Gillispie was
22 working at GM.

23 Q. On which date?

24 A. On August 5th of 1988.

25 Q. Had you already confirmed whether he was working on

1 August 20th?

2 A. Yes, that information had been provided by Rick Wolfe
3 earlier.

4 Q. All right. Did there come a time where you went to the
5 prosecutor's office to review the findings of your
6 investigation?

7 A. Yes.

8 Q. And what did you take with you when you went to review
9 that with them?

10 A. The case files.

11 Q. And did you take the entire case file?

12 A. I had made copies for both prosecution and for defense
13 of everything that I had on the case.

14 Q. And that was in anticipation that charges might, in fact,
15 be approved or authorized by the prosecutor's office?

16 A. Yes, sir.

17 Q. And who did you meet with on that occasion?

18 A. I met with Linda Holland, who was an assistant
19 Montgomery County prosecutor.

20 Q. And would it have included, among other things, the
21 reports that we have reviewed together today?

22 A. It would have reviewed -- it would have been everything
23 that I had.

24 Q. Right. I understand everything. But part of everything
25 would have been some of the reports we're reading as we speak?

1 A. That's correct.

2 Q. All right.

3 A. Yes.

4 Q. Plus the documents that we reviewed last week with you?

5 A. Correct.

6 Q. And yet others. I understand. All right.

7 And did Ms. Holland review those materials?

8 A. Yes, she did.

9 Q. And did she have discussion with you about those
10 materials?

11 A. We talked about the case, and we talked about the
12 identifications.

13 Q. And what decision, if any, did she make?

14 A. That a warrant would be issued on only one charge
15 concerning Bonnie Wise for rape, and that the rest of the
16 charges would go direct to the Montgomery County Grand Jury.
17 And she added some things to the felony filing sheet.

18 Q. And as a result of her approving that charge, was a
19 criminal complaint then prepared?

20 A. Yes, it was.

21 Q. And that resulted in the arrest of Mr. Gillispie?

22 A. Eventually, yes.

23 Q. And turning to the entry of 9-1-90, did there come a time
24 where you obtained a search warrant?

25 A. Yes, there did. But on 9-1 is when I actually drove

1 out to his residence to get a description of the residence
2 to be placed into the body of the search warrant. It's one
3 of the things that you need.

4 Q. All right. And did you have a conversation with
5 Mr. Gillispie on 9-1?

6 A. I believe it was after I got back to the police
7 department after getting the description, there was a
8 telephone call.

9 Q. Okay. And that telephone call, was that Mr. Gillispie?

10 A. The telephone call was made to Roger Gillispie.

11 Q. All right. And tell me about the discussion that you had
12 with Mr. Gillispie during that telephone call.

13 A. Well, it basically had to do with I was trying to find
14 something that could either be used to prove or disprove his
15 whereabouts at the time. And in this particular case, I was
16 trying to find out if he had any checkings account, savings
17 accounts, any receipts, anything that would show where he
18 may have been on August 5th or August 20th that would have
19 assisted me in my investigation.

20 We talked about a Visa card, which he had actually
21 obtained in 1989, which, therefore, would not have been of
22 any use at that time because that is actually after the fact
23 of when the incidents occurred in 1988. And he told me that
24 he did not have any checkings or savings accounts in 1988.

25 Q. And did you tell him the reason that you wanted this

1 information?

2 A. Yes, I did.

3 Q. And what was that reason?

4 A. That I needed to either prove or disprove his innocence
5 here.

6 Q. And did the issue of Cave Run Lake in Morehead, Kentucky,
7 come up as a part of that discussion?

8 A. Yes, it did.

9 Q. And tell me about that, please.

10 A. This is where he ends up stating to me that he was at
11 Twin Knobs campgrounds, and that he had been down there for
12 32 straight weekends in a row.

13 Q. And did he tell you anything about Mr. Fyffe at that
14 time?

15 A. I believe that it was just that he would go down there
16 with him. He did provide me with a telephone number for the
17 campgrounds.

18 Q. And is that the number you reached out to to try and find
19 campground receipts?

20 A. Yes.

21 MR. McLANDRICH: Scroll down a little more Jeff,
22 please.

23 BY MR. McLANDRICH:

24 Q. And, in fact, you then record that initial effort to
25 reach out to Twin Knobs?

1 **A.** Yes, I did. And at that time, I talked to a female by
2 the name of Laura.

3 **Q.** Let's go to the entry of 9-4, please. And what does that
4 relate to, sir?

5 MR. McLANDRICH: Blow it up a little, Jeff, please.

6 BY MR. McLANDRICH:

7 **Q.** Is this what you described earlier in terms of your
8 ongoing efforts to obtain the campground receipts?

9 **A.** Yes, sir, it is. Based on my conversation with Laura,
10 she told me to contact Bob Strossnyder.

11 MR. McLANDRICH: Next entry, please.

12 (Exhibit displayed.)

13 BY MR. McLANDRICH:

14 **Q.** Next entry relates to the search warrant and the
15 execution of the search warrant; is that true?

16 **A.** That would have been on September 5th.

17 **Q.** And during that search of the home, is it true that you
18 did not obtain any evidence that implicated Mr. Gillispie's
19 guilt?

20 **A.** I did not obtain any -- yes, that's correct.

21 **Q.** And you accurately recorded that fact, did you not?

22 **A.** There was an inventory and receipt made up, which is
23 part of a search warrant.

24 MR. McLANDRICH: 9-6, please.

25 (Exhibit displayed.)

1 BY MR. McLANDRICH:

2 Q. What is 9-6 about, sir?

3 A. This is where I receive a call back from Fred Mariott
4 from down in Kentucky, and he tells me that he did not find
5 anything for August and that he did find campground
6 receipts, I believe it was for May, June, and July.

7 Q. And those are the receipts that were mailed to you?

8 A. Yes, sir.

9 MR. McLANDRICH: That's all for this document.
10 Thank you.

11 BY MR. McLANDRICH:

12 Q. Detective Moore, have you ever had an occasion where an
13 eyewitness identification turned out to be inaccurate?

14 A. Yes, I have.

15 Q. Please tell us about that.

16 A. I had a bank robbery case. I had put together a photo
17 lineup. The teller identified the wrong individual, and I
18 ended up proving that through the use of finding out that he
19 was down in Cincinnati, Ohio, at the time when this bank
20 robbery had occurred locally. And I actually recovered
21 videotape to show that he was actually in that bank when the
22 robbery was taking place here, so I knew that photo
23 identification was no good.

24 Q. And you knew to look there because the individual had
25 told you to look there?

1 A. That's correct.

2 Q. And then I assume that individual was not prosecuted?

3 A. That's correct.

4 Q. At all times with respect to your investigation
5 concerning Mr. Gillispie, did you make your best efforts to
6 create truthful, accurate documents?

7 A. Yes, sir.

8 Q. At any time with respect to your investigation of
9 Mr. Gillispie, did you do anything to suppress, destroy, or
10 otherwise not produce to the prosecutor and the defense
11 attorney documents you felt would be helpful to Mr. Gillispie?

12 A. I would never do that.

13 Q. And that includes the preparation and presentation of the
14 photo arrays, correct?

15 A. Yes.

16 Q. Did any of the suspect -- I'm sorry. Did any of the
17 victims ever say anything to you about tattoos?

18 A. Not that I remember.

19 Q. If they had, would you have recorded that into your
20 reports?

21 A. I would have.

22 Q. And is that true if it would have helped to identify the
23 perpetrator?

24 A. It could.

25 Q. And when you -- did you personally book Mr. Gillispie

1 after his arrest?

2 A. I had another officer do it. I was there, in and out.

3 Q. Would it be normal during a booking to try and inventory
4 any unique aspects of an individual?

5 A. Yes, there are sections on the print cards in which you
6 try to identify tattoos and/or scars or marks.

7 Q. Other than that reference to tattoos, any other reference
8 that came to your ears? From the victims, I mean.

9 A. No.

10 Q. If you had convinced yourself that Mr. Gillispie was
11 innocent, would you have continued to make any effort to
12 prosecute him?

13 A. Absolutely not.

14 Q. Were you ever able to establish as a factual matter
15 Mr. Gillispie's innocence?

16 A. Was I able to establish his innocence?

17 Q. Yes, sir.

18 A. No.

19 Q. And to the contrary, the evidence you had suggested that
20 he was or could be the perpetrator?

21 A. Based on the identifications that I had, yes.

22 Q. And at that point, the matter's out of a policeman's
23 hands; no?

24 A. Once I get the filing, it's now in the prosecutor's
25 hands.

MOORE - DIRECT (McLandrich)

960

1 MR. McLANDRICH: Let's bring up just for the witness
2 at this point Plaintiff's 119.

3 THE COURT: Has this been --

4 MR. McLANDRICH: He wants me to lay a foundation
5 before it's displayed to the jury. So I will do so.

6 BY MR. McLANDRICH:

7 Q. Detective, can you see Plaintiff's 119? It's not up yet.

8 THE COURT: We're not putting it up.

9 MR. McLANDRICH: We are just going to show him, got
10 it. Thank you.

11 THE WITNESS: This is a photo lineup.

12 BY MR. McLANDRICH:

13 Q. And does that particular photo lineup have any exhibit
14 stickers on it?

15 A. It has State's Exhibit 1 and State's Exhibit 26.

16 Q. And have you seen that photo lineup before?

17 A. Yes.

18 Q. Is that the photo lineup that you prepared?

19 A. Yes.

20 Q. Is it a fair representation of the lineup that was
21 presented to the various victims, recognizing that the
22 sequence of the photos was changed with each victim?

23 A. From what I remember, yes.

24 MR. McLANDRICH: Any objection?

25 MR. KANOVITZ: Yes, I will object to foundation.

1 THE COURT: Counsel approach.

2 (At sidebar.)

3 THE COURT: Your objection?

4 MR. KANOVITZ: My objection --

5 THE COURT: Your name first.

6 MR. KANOVITZ: Mike Kavovitz for the plaintiff.

7 Here's what he wants to show, okay (indicating). This is a
8 picture of him. That's on the other side. So that's
9 basically like a booking photo; you can see both front and
10 side. The only foundation that he's laid that this was, in
11 fact, shown is that it says State's Exhibit 1, State's Exhibit
12 26. Well, so does the one that's been used. And the fact of
13 the matter is that what happened here is these can slide
14 around and, in fact, this was all newly constructed. So this
15 is not the actual thing that he showed.

16 MR. McLANDRICH: How do we know that this one is the
17 actual thing you showed and not this one and this isn't the
18 reconstructed (indicating)?

19 MR. KANOVITZ: First of all, he's already endorsed
20 that on direct. And, secondly, I mean, there can't be a
21 foundation that this is it if they both have the exact same
22 basis for the foundation.

23 THE COURT: So are you saying these are the same
24 photo lineups?

25 MR. KANOVITZ: So basically what happened at the

1 trial is that the State used the sleeve that you put these
2 things in, and it had Moore reconstructed. And so this is
3 what was shown at the criminal trial.

4 You can move the pictures around. The sleeve was marked,
5 and still the sleeve -- the only foundation that's been laid
6 is that this is the sleeve, not that the pictures were as is
7 depicted here.

8 THE COURT: I'm not sure I still understand.

9 MR. McLANDRICH: So what's happened over time --
10 John McLandrich. What's happened over time is that if you
11 pull the cover off --

12 THE COURT: All right.

13 MR. McLANDRICH: -- this guy's got two pictures;
14 one's a front shot because it's a booking photo, and the
15 other's the profile view. And so what we don't know is which
16 one of these existed at the time of trial. And the fact that
17 he endorsed it means, frankly, absolutely nothing 'cause he,
18 I'm sure, probably doesn't know.

19 THE COURT: Can -- well, my suggestion is you have
20 him -- don't display it. You have him testify to it. And
21 then I'll make a decision what comes in in exhibits, admitted
22 into evidence.

23 MR. KANOVITZ: Okay. Depending upon how it comes
24 out, I may need to actually cross on it, in which case --

25 THE COURT: You can cross on it.

1 MR. KANOVITZ: Okay. Thanks.

2 THE COURT: If there is a -- if -- I've got to hear
3 about this.

4 MR. KANOVITZ: Okay.

5 THE COURT: If there's testimony that this was the
6 photo lineup that was used, there's testimony to that effect,
7 you're going to present testimony that this --

8 MR. McLANDRICH: I've got another way to address it.
9 I've got the black-and-white photo copies of the arrays that
10 were made, and I just wasn't going to use them because they
11 are ugly black-and-whites that were made with the fact sheets
12 and the general instructions. So those would have been
13 contemporaneous documents when the arrays were presented. So
14 I'll just show those.

15 MR. KANOVITZ: I don't know what the foundation for
16 those is but --

17 THE COURT: You see what I'm saying. The damage, if
18 any, at this point would be if these are displayed to the
19 jury. So my thought is if you've got them marked, you can
20 have him -- you can ask your questions with regard to these.
21 And then the Court will have to determine whether or not --

22 MR. McLANDRICH: I think if I go through the
23 black-and-whites, it may well lay the missing piece of
24 foundation or at least make it easier for you to decide later.

25 MR. MORRIS: Were these photocopies made at the time

1 of the array or after the trial?

2 MR. HERMAN: This is Chris Herman. At the time that
3 they were shown to the victims.

4 THE COURT: Do you understand?

5 MR. MAYER: I understand in the sense that they are
6 pictures that are different between these two.

7 THE COURT: Right.

8 MR. MAYER: I mean, this guy's also slid down. And,
9 obviously, the sticker is on the black portion, which isn't
10 going to move.

11 THE COURT: Right.

12 MR. MAYER: And so if you say it's difficult to say
13 this is what was shown at trial for what was shown to the
14 victims but then also say this was what was shown at trial to
15 the victims, because they are not, obviously, the same thing.

16 MR. McLANDRICH: And based on the other testimony,
17 it seems like the critical time is when they are shown in the
18 photo array presentation unless a trial --

19 MR. MORRIS: Is the argument -- are you saying that
20 these were shown separately to the same victim, or these were
21 shown to two separate victims?

22 MR. McLANDRICH: I think what happened at trial
23 was -- well, obviously, we have a disagreement, but as I
24 understand it, this one was shown at trial. Mike thinks this
25 one was shown at trial and actually has the same exhibit

1 numbers.

2 So what has obviously happened -- we just don't know
3 which is the correct one -- is that the photos have been, you
4 know, in some cases jostled around, and in this guy's case,
5 you know, frontal view versus profile.

6 MR. KANOVITZ: So -- Mike Kanovitz. So the witness
7 has unequivocally testified that Plaintiff's Exhibit 285, page
8 6, is what was shown to the jury at trial. Clearly, clearly
9 both of them have the sleeve marked with the same exhibit
10 stickers in the same place; and, therefore, there is no
11 foundation for 119 having been shown to the jury in the
12 criminal trials.

13 MR. McLANDRICH: Except, Mike, that, A, he can
14 change his testimony; B, this was taken at -- not at trial.
15 This was taken at a document inspection by your office, and
16 there's other photos which show the cover being taken off.
17 And so I don't know whether this photo was taken after the
18 cover was put back on and it was reconstructed improperly or
19 not. We don't know that that is the representation of what
20 happened at trial.

21 MR. KANOVITZ: For the record, 119, there is no
22 foundation that this is a picture of what was taken at trial.
23 And this is how it looked when the inspection -- I'm sorry.
24 So Plaintiff's 285, page 6, is how it looked when the
25 inspection took place.

1 MR. McLANDRICH: Well, and this --

2 THE COURT: So the --

3 MR. McLANDRICH: -- is from a prior inspection.

4 THE COURT: So the difference between these two is
5 that these guys are switched?

6 MR. KANOVITZ: They are switched, and the one who is
7 in Number 3 position on 285 is clearly forward facing booking
8 photo, when on 119, it appears to show the, you know, "turn to
9 the left" booking photo. So the side view.

10 THE COURT: Okay.

11 MR. KANOVITZ: And my objection is there is no
12 foundation for the idea that the witnesses were ever shown one
13 person in a side view and the rest of them forward. There
14 just -- there is nothing to support that. And the -- what has
15 been put on so far doesn't establish that foundation, and we
16 know that the pictures move around.

17 THE COURT: I'm trying to -- we're going to have to
18 break. We are going to have to go back here on record.

19 (In open court.)

20 THE COURT: Ladies and gentlemen, I apologize, but
21 it's going to be necessary for the Court to recess for a few
22 moments to make some determinations that it needs to make
23 outside of your presence. So please be patient. And that
24 doesn't necessarily extend the day past 4:30. So don't worry
25 about that. But we'll be back with you as soon as we can.

1 Thank you.

2 THE COURTROOM DEPUTY: All rise. This court stands
3 in recess.

4 (Jury out at 3:19 p.m.)

5 (Jury in at 3:24 p.m.)

6 (In open court at 3:25 p.m.)

7 THE COURT: Sorry, ladies and gentlemen, but as I
8 have told you -- we haven't had to do too much -- every once
9 in a while I need to -- I need to consider and make some
10 decisions or go in a certain direction outside of your
11 presence. So please understand that. Don't lay that at
12 anyone's feet other than the fact that the Court needs to do
13 those things in order to give everyone a fair opportunity to
14 be heard, all right? Thank you.

15 Counsel.

16 MR. McLANDRICH: Thank you, Your Honor.

17 I'd like to pull up Defendant's 18 again, please.

18 (Exhibit displayed.)

19 BY MR. McLANDRICH:

20 Q. Detective Moore, Defendant's 18, again, this is the
21 instructions for S.C., correct? The photo array instructions?

22 A. Yes, it is.

23 MR. McLANDRICH: Let's go to the third page, please.

24 (Exhibit displayed.)

25 BY MR. McLANDRICH:

1 Q. Is this a photocopy of the lineup that you utilized with
2 C.W.?

3 A. This appears to be a photo lineup, yes.

4 Q. And do you have some reason to doubt whether this is the
5 one you used with C.W.?

6 A. I had received a picture of the lineup, I believe it
7 was, back on November 8th of 2019, from --

8 MR. KANOVITZ: Objection; non-responsive and
9 relevance.

10 THE COURT: Is there a reason you don't believe this
11 is it? This is your -- I think that's your question. Do you
12 want it --

13 MR. McLANDRICH: Let me rephrase the question, Your
14 Honor. That's probably the easiest step.

15 BY MR. McLANDRICH:

16 Q. So, Detective, when you would perform the photo array,
17 would you make a copy of the array that you used on that day
18 with that witness?

19 A. Yes, you would.

20 Q. And is this the copy that you made for C.W.?

21 A. I believe so but I, again, with this issue and --

22 MR. McLANDRICH: Let's bring up Defendant's 19
23 again, please.

24 (Exhibit displayed.)

25 BY MR. McLANDRICH:

1 Q. Are these the instructions you used with B.W.?

2 A. Yes, they are.

3 MR. McLANDRICH: Let's go to the third page.

4 (Exhibit displayed.)

5 BY MR. McLANDRICH:

6 Q. Does this appear to be a photocopy of the array that you
7 would have used with B.W.?

8 A. Yes.

9 Q. Let's go to Defendant's 22, please.

10 (Exhibit displayed.)

11 BY MR. McLANDRICH:

12 Q. Is this a copy of the instructions you used with S.C.?

13 A. Yes.

14 MR. McLANDRICH: Let's go to the third page.

15 (Exhibit displayed.)

16 BY MR. McLANDRICH:

17 Q. Does this appear to be a poor black-and-white copy of the
18 photo array that you would have used with S.C.?

19 A. Yes.

20 Q. Now, I understand these are all black-and-white copies I
21 have shown you, but they all would have been color in real
22 life, correct?

23 A. Yes.

24 MR. McLANDRICH: Would you bring that back up for a
25 minute, Jeff.

1 (Exhibit displayed.)

2 BY MR. McLANDRICH:

3 Q. And in these photos, primarily the head of the various
4 individuals that are shown?

5 A. Yes.

6 Q. And was that true for all three? I could bring the
7 others back up if you need to see them again.

8 A. No, that was true for all three.

9 Q. When was the first time, if you recall, that you ever
10 heard about this report that Mr. Bailey reportedly created,
11 that excluded Mr. Gillispie?

12 A. It's been a while ago. I don't remember exactly when.

13 Q. Many years later?

14 A. Oh, yes, it definitely would have been many years
15 later.

16 Q. And as a police officer, did you understand you had a
17 duty to deliver all the evidence, good and bad, to the
18 prosecutor?

19 A. Absolutely.

20 Q. And you did that in this case?

21 A. Yes, I did.

22 Q. Has there ever been an allegation that you failed to do
23 that in any other case?

24 A. Never.

25 Q. Thank you. That's all I have for you, Detective.

1 CROSS-EXAMINATION

2 BY MR. KANOVITZ:

3 Q. Good afternoon.

4 A. Good afternoon.

5 Q. So just moments ago we were looking at black-and-white
6 photo copies of photo arrays that you used with the three
7 victims --

8 A. Yes, sir.

9 Q. -- do you recall that?

10 And were those photocopies that you made
11 contemporaneously or did you reconstruct the photos in the
12 positions that you have used them and then make photocopies of
13 that?

14 A. Actually, after showing the photo lineup to the
15 individual, I would then go make a photocopy of it at that
16 time.

17 Q. And the way that the sleeve -- I'm sorry. The way that
18 the folder worked, was it possible for photos to shift a
19 little bit in the box?

20 A. Well, except for the fact I taped them on in their
21 spots so they wouldn't slip.

22 Q. Okay. So the way that you chose to tape them in the box
23 is exactly as they appeared in those three photocopies,
24 correct?

25 A. Yes.

1 Q. You were asked questions about showing the photo array to
2 C.W. Do you recall that?

3 A. Yes.

4 Q. And you read from the "Remarks" that you wrote down on
5 the photo lineup fact sheet, correct?

6 A. I believe that's what we did.

7 Q. And to be clear, what was on that fact sheet was not the
8 witness writing down her remarks, it was you writing down your
9 recitation of the witness's remarks, correct?

10 A. They were written down at the time I was with them,
11 yes.

12 Q. So like you were taking notes basically as you went?

13 A. I guess that would be it.

14 Q. Okay. Why didn't you write down that you had to read
15 C.W. the question regarding when a witness cannot make an
16 identification?

17 A. After reviewing my report, I'm not sure exactly that's
18 how that went.

19 Q. Well, we saw the -- we saw the testimony that you gave to
20 the grand jury, correct?

21 A. I believe so.

22 Q. And you told the grand jury that you read her the
23 sentence, right?

24 A. I independently don't remember that right now.

25 Q. Okay. Would it refresh your recollection to see it? Do

1 you need to see it or do you recall at least from Thursday
2 that that's what we went over?

3 A. I believe that we had went over something, yes.

4 Q. We specifically -- it's not just something. We
5 specifically went over the fact that in the grand jury
6 testimony you told the grand jury that you read C.W. the
7 sentence, right?

8 A. I believe so.

9 Q. Now, you told this jury today that with C.W. she had,
10 quote-unquote, narrowed it down to one. Do you recall that?

11 A. Yes.

12 Q. And that's when you did the a hundred percent sure thing?

13 A. Actually, I had made the 100 percent sure thing prior
14 to any statements.

15 Q. Okay. Isn't it true that you told the grand jury that
16 she actually hadn't narrowed it down to one, she had narrowed
17 it down to a couple?

18 A. I don't remember that. But it is possible.

19 THE COURT: Counsel, are you going to refresh his
20 recollection? Is that what you're about to do?

21 MR. KANOVITZ: I suppose it is in a posture of
22 refreshing the recollection.

23 THE COURT: Give us the exhibit, please.

24 MR. KANOVITZ: It's Exhibit 131.

25 THE COURT: And the page number?

1 MR. KANOVITZ: Just a moment, Your Honor.

2 Page number 6.

3 THE COURT: Line? Or lines?

4 MR. KANOVITZ: It will be line --

5 THE COURT: Or that you want him to --

6 MR. KANOVITZ: I'm sorry. I'm in the wrong exhibit.

7 I apologize.

8 It should be PX1.

9 May I reask the question, Your Honor?

10 THE COURT: You may.

11 MR. KANOVITZ: Thank you. So I will withdraw that.

12 BY MR. KANOVITZ:

13 Q. Isn't it true that you testified in court in front of a
14 judge at a hearing that occurred before trial that when you
15 were observing C.W. she looked over the photographs, and
16 within a couple of minutes, you could tell that she had
17 visually narrowed her pics down to, quote-unquote, a couple
18 photographs. Do you recall that?

19 A. There's a lot I don't recall after 30 years. I mean,
20 it's possible. If you are reading that from a document,
21 then, yes.

22 Q. Would it refresh your recollection to look at the
23 document?

24 A. Yes, sir.

25 MR. KANOVITZ: It's PX1, page 18.

1 THE COURTROOM DEPUTY: I'm sorry, Counsel. Page?

2 MR. KANOVITZ: Page 18. And the answer runs from
3 line 12 to line 19.

4 THE COURT: So it's PX1, page 18, lines?

5 MR. KANOVITZ: 12 through 19.

6 THE COURT: 12 through 19.

7 I am going to ask you, Mr. Moore, please review that,
8 read that to yourself, and then bring it to our attention when
9 you're done.

10 THE WITNESS: Okay.

11 BY MR. KANOVITZ:

12 Q. Okay. And isn't --

13 THE COURT: Go ahead.

14 MR. KANOVITZ: Thank you, Your Honor.

15 BY MR. KANOVITZ:

16 Q. And isn't it true that what you told the judge was that
17 C.W. looked over the photographs for a couple minutes and then
18 you could visually tell that she had narrowed her pick down to
19 a couple photographs, correct?

20 A. Yes.

21 Q. Thank you. And you did not record that fact either in
22 the photo lineup fact sheet, correct?

23 A. I don't believe so.

24 Q. And I was referencing the photo lineup fact sheet for
25 C.W. You understood that, right?

1 A. Yes.

2 Q. Now, you testified on direct about a portion of your
3 police report, the supp reports, where you documented a phone
4 call that you had with S.C. Do you recall that?

5 A. Yes.

6 Q. And she told you, "Yeah, I think my memory's good enough
7 that I can make an identification." That's what you wrote in
8 the report, right?

9 A. Without seeing that, I don't independently remember,
10 but I do remember we had a conversation about that.

11 Q. You don't recall that when you were -- when it was up
12 there, something to the effect of, she still remembers the
13 suspect and will have no problem picking him out?

14 A. She did make that statement.

15 Q. And you wrote that in your report?

16 A. It's in my report.

17 Q. Why do we not have a similar documentation of the phone
18 calls with C.W. and B.W. before you showed the photo lineups
19 to them?

20 A. One of them I had ended up showing the lineup to, and I
21 requested that she contact her sister to see about having
22 her come in.

23 Q. Well, actually, didn't she tell the jury that you had
24 talked to both of them and there was some issue with getting
25 off work?

1 A. I don't remember all that independently. I know that
2 there is something about that.

3 Q. Okay. Well, then at least as to C.W., why don't we have
4 a record of your phone call with her when you were asking her
5 if she could come view the lineup?

6 A. I guess I didn't document it.

7 Q. That was a choice you made?

8 A. That was a choice I made, but she got there somehow.

9 Q. I'm not talking about how she got to the police station.
10 I'm talking about --

11 THE COURT: All right. Next question.

12 MR. KANOVITZ: Thank you, Judge.

13 BY MR. KANOVITZ:

14 Q. The entire police report, the supp report that you typed
15 up that we looked at, that's done on essentially like a word
16 processor, right?

17 A. It's done on a computer.

18 Q. But it's like with a word processing system?

19 A. I don't know what kind of system it was. I just know
20 it was done on a computer.

21 Q. You type it in, and then you have the ability to make
22 changes later, right?

23 A. Yes, you could.

24 Q. Okay. So do we know if you ever made any changes to this
25 report after you initially typed the reports?

1 A. I have no idea.

2 Q. So that's --

3 A. It's 30 years.

4 Q. And there would be no record in the police department of
5 whether you edited these reports, correct?

6 A. Again, I have no idea. It's 30 years. You're asking
7 me to remember something that's a long time ago.

8 THE COURT: You've answered the question.

9 MR. KANOVITZ: Your Honor, I'd like to publish
10 Plaintiff's Exhibit 104, page 11. This page was shown to the
11 jury under a defendant's exhibit, but it's the same page.

12 THE COURT: Wait. Hold on a second.

13 MR. McLANDRICH: I don't know what page it is.

14 MR. KANOVITZ: May I confer?

15 THE COURT: I'm not so worried about letting it be
16 published. I just want to let everybody see where we are
17 going.

18 MR. McLANDRICH: Yes, thank you. I just wanted to
19 know what it was.

20 THE COURT: All right. You can.

21 (Exhibit displayed.)

22 MR. KANOVITZ: Could you focus in on the second full
23 paragraph, please. So this is the second full paragraph on
24 page 11 of Plaintiff's Exhibit 104.

25 BY MR. KANOVITZ:

1 Q. Do you see towards the bottom there the sentence that
2 says, "He then said that the campsite was rented by my friend
3 Jerry Fyfe," F-Y-T-E?

4 A. Yes.

5 Q. And you note that you are not sure that that's the
6 correct spelling, right?

7 A. Yes.

8 MR. KANOVITZ: Now, could we show page 12, please.

9 (Exhibit displayed.)

10 BY MR. KANOVITZ:

11 Q. And that was on 9-1-90, correct?

12 A. Yes.

13 Q. Thank you.

14 MR. KANOVITZ: Can we show -- let's look at the
15 entry for 9-4-90, and could you enlarge -- that's fine.

16 BY MR. KANOVITZ:

17 Q. So if we look at the last paragraph there, you are
18 suddenly spelling Jerry Fyffe correctly, F-Y-F-F-E, correct?

19 A. Yes. I believe that's several days later.

20 Q. Right. But there's no entry in your report in between
21 those two dates at all, right? There is no investigation that
22 you documented in here, correct?

23 A. I don't believe so. I'm just --

24 Q. So how did you learn in that -- in that particular
25 interval of time, how did you learn the proper way to spell

1 Mr. Fyffe's name?

2 A. I don't recall.

3 Q. Is it possible that you learned how to spell his name
4 after the fact and then went back and edited the report?

5 A. I don't recall.

6 Q. Okay. On -- well, actually, before we leave that, you
7 testified about talking to a man named Mariott about sending
8 you -- sending you the cards? From the campground?

9 A. Yes, I did.

10 Q. And the letter that you got didn't actually come from
11 Marriott, did it?

12 A. He was who I talked to about them, and I take it that I
13 received them from him.

14 Q. Okay. Would it refresh your recollection to see the
15 letter?

16 A. Yes.

17 MR. KANOVITZ: May the witness be shown for purposes
18 of refreshing his recollection Plaintiff's Exhibit 205, page
19 3?

20 THE COURT: Sure.

21 MR. KANOVITZ: Thank you.

22 BY MR. KANOVITZ:

23 Q. Have you had chance to refresh your recollection?

24 A. I've looked it over. I independently don't remember.

25 THE COURT: Your question.

1 MR. KANOVITZ: Your Honor, at this time I'd like to
2 publish Plaintiff's Exhibit 205, page 3 of 7.

3 I'm sorry. Let me ask the predicate question.

4 BY MR. KANOVITZ:

5 **Q.** Do you have any reason to believe that the letter that
6 you just looked at is not a true and accurate copy of the
7 letter that you received from the Park Service?

8 **A.** I don't -- like I said, I don't remember it
9 independently.

10 **Q.** Well, let me ask it this way: Do you, in fact, have any
11 letters from Mr. Mariott?

12 **A.** I independently don't remember that. It's been 30
13 years.

14 THE COURT: Hold on a second.

15 Counsel, are you objecting to this? This display of this
16 letter?

17 MR. McLANDRICH: Not to that letter, no.

18 THE COURT: Counsel, it can be displayed.

19 This is part of your official record at least.

20 THE WITNESS: I just don't remember it.

21 THE COURT: This is part of your police department
22 record --

23 THE WITNESS: Okay.

24 THE COURT: -- is that correct?

25 THE WITNESS: I believe so. I believe they would

1 send me a letter with copies of the receipts, yes.

2 THE COURT: Go ahead. It's not objected to.

3 (Exhibit displayed.)

4 BY MR. KANOVITZ:

5 Q. And, in fact, we talked about this Thursday, but you
6 filed an affidavit in 2008 regarding the camping receipts. Do
7 you recall that?

8 A. No.

9 Q. Isn't it true that the person that sent the letter to you
10 inclosing campground records is a man named James Manner, not
11 Mr. Mariott, correct?

12 A. That's correct.

13 Q. And the letter doesn't document how many camping receipts
14 you received, correct?

15 A. That's correct.

16 Q. And it does not document which camping records you
17 requested, correct?

18 A. It says that the campground records are for Twin Knobs.

19 Q. I see. But it doesn't document what date range, whose
20 names, any of that, correct?

21 A. That's correct.

22 Q. All right. On Thursday, do you recall counsel showing
23 you some composites and talking about how the hair description
24 on the composite was brown with reddish tint? Does that ring
25 a bell?

1 **A.** I remember that was a description that had been given.

2 **Q.** Well, does it ring a bell that that is the description
3 that appeared on the composite?

4 **A.** I believe that it does.

5 MR. KANOVITZ: And could we publish DX5, which was
6 previously shown, Your Honor?

7 THE COURT: All right.

8 (Exhibit displayed.)

9 MR. KANOVITZ: Please focus in on the second
10 paragraph.

11 BY MR. KANOVITZ:

12 **Q.** Do you know what? I'll do this orally.

13 We talked about the fact that on the first composite the
14 man with the sunglasses, that was a description typed in that
15 said reddish-brown hair, correct?

16 **A.** Yes, sir.

17 **Q.** And then your counsel also showed you the version without
18 the sunglasses, right?

19 **A.** Yes.

20 **Q.** And the version without the sunglasses is the one that
21 S.C. created, right?

22 **A.** Yes.

23 **Q.** And he said, "Oh, look, there again, reddish-brown hair,"
24 being the description, right?

25 **A.** Without seeing it, I don't know what it says.

1 **Q.** Isn't it true that the reddish-brown was carried over
2 from one composite to the other and did not actually reflect
3 S.C.'s description?

4 MR. McLANDRICH: Objection.

5 THE COURT: Sustained.

6 What are we talking about right now?

7 MR. KANOVITZ: We're talking about the two
8 composites.

9 THE COURT: Shouldn't you show him that?

10 MR. KANOVITZ: I was just worried about the stuff
11 not coming up on the screen.

12 BY MR. KANOVITZ:

13 **Q.** If you could take a look, please --

14 MR. KANOVITZ: Could he be shown Defendant's Exhibit
15 4?

16 THE COURT: All right. For the record, I am
17 sustaining those objections.

18 Start over.

19 BY MR. KANOVITZ:

20 **Q.** Let me know when you've had --

21 THE COURT: Let him look.

22 THE WITNESS: Okay.

23 THE COURT: You're looking at Exhibit 4?

24 THE WITNESS: I am looking at DX4, yes.

25 BY MR. KANOVITZ:

1 Q. And DX4 is the composite that S.C. created, correct?

2 A. I believe so, yes.

3 Q. Okay. And it has the hair, reddish-brown color, right?

4 A. That is what it says.

5 Q. And, in fact, S.C. said that the hair was light blondish,
6 right?

7 A. I believe in her statement, yes.

8 Q. Okay. So do you agree that the description of
9 reddish-brown was carried over to the S.C. composite from the
10 one that had the sunglasses?

11 A. Yes, and that would have been done by the person who
12 prepared this.

13 Q. Understood. Long before you got involved in the case,
14 right?

15 A. Oh, yes.

16 Q. And, actually, the description of reddish-brown was not
17 what the -- B.W. and C.W. told to the detective when the
18 detective first interviewed them, correct?

19 A. C.W. and B.W.?

20 Q. Yes.

21 A. I thought one of them had said that it was brown with a
22 reddish tint, and the other one said it was an orangish
23 tint.

24 THE COURT: First, first, this was a conversation
25 between who?

1 MR. KANOVITZ: Detective Bailey and C.W. and B.W.

2 THE COURT: And you are asking this officer what was
3 said during that?

4 MR. KANOVITZ: Yes. Well, just the specific
5 descriptions that they gave.

6 THE COURT: Do you know?

7 THE WITNESS: Just based on documents. I mean, I
8 wasn't privy to their conversations.

9 MR. KANOVITZ: Could the witness be shown
10 Plaintiff's Exhibit 281, page 2 of 2?

11 BY MR. KANOVITZ:

12 Q. Please take a look at Plaintiff's Exhibit 281. You can
13 look at pages 1 and 2 and tell us what type of document this
14 is, please.

15 A. This is a supplementary report filled out by Detective
16 G. L. Bailey.

17 Q. On what date?

18 A. August 22, 1988.

19 Q. And is this the sort of document that gets kept by the
20 police department and prepared in the ordinary course of
21 business?

22 A. Yes.

23 Q. Now, turning to page 2, did Detective Bailey record the
24 description of hair color that B.W. gave?

25 A. Yes.

1 Q. And what did he record?

2 A. Orangish-brown hair.

3 Q. And did Detective Bailey also record C.W.'s description
4 of the color?

5 A. Yes.

6 Q. Okay. And what did he record as the color that C.W.
7 gave?

8 A. He recorded brownish-red hair.

9 Q. Okay. He did not record brown hair with a red tint,
10 correct?

11 A. That is not what is recorded in this written statement.

12 Q. And then on the night that the victims -- well, the wee
13 hours of the morning when the victims came to the police
14 station after the event, would they have been interviewed?

15 THE COURT: If you know.

16 THE WITNESS: Could you repeat the question again?

17 BY MR. KANOVITZ:

18 Q. Would the victims have been interviewed when they came to
19 the police station, to the Miami Township Police Department
20 following the event?

21 A. They would have been interviewed, yes.

22 Q. Okay. And I believe this is Defendant's --

23 MR. KANOVITZ: Could the witness be shown
24 Defendant's Exhibit 1, please.

25 BY MR. KANOVITZ:

1 Q. Please take a look at Defendant's Exhibit 1 and tell us
2 what type of document this is.

3 A. This is a cover sheet for a report.

4 Q. And who is that -- at what time and date was that report
5 prepared?

6 A. On August 21, 1988, at 0134 hours.

7 Q. So the wee hours of the morning following the event when
8 the women were at the police station, correct?

9 A. Yes.

10 Q. Okay. And does -- and who is it prepared by?

11 A. R. E. Burling.

12 Q. And Mr. Burling is the patrolman, right?

13 A. He is the patrol officer that took the initial report,
14 yes.

15 Q. And that's different than the detective that gets
16 assigned to the case, right?

17 A. And that's correct.

18 Q. And isn't it -- well, didn't Mr. Burling purport to
19 prepare a statement that was jointly for both women at the
20 same time? Look at the bottom left.

21 A. Oh, you mean under the signatures? Where both names
22 are written?

23 Q. Yes, correct.

24 A. Yes.

25 Q. Okay. And then in that report, he gives a description of

1 the hair color on page 2, correct?

2 A. Yes.

3 Q. And that is -- he doesn't attribute it to one or the
4 other of the sisters, correct?

5 A. No, he doesn't.

6 Q. And isn't it true that that's the source of the
7 description brown with a red tint?

8 A. Yes.

9 Q. Okay. In the course of your involvement in the case, did
10 you receive the report from the Miami Valley Crime Lab
11 regarding the hairs?

12 A. The hairs and the fibers?

13 Q. Yes.

14 A. I believe that we had that in the packet.

15 Q. Okay. And those hairs that were found from the -- from
16 the victims' clothing, the head hairs were light brown,
17 correct?

18 A. I think there was some testimony to that effect.

19 THE COURT: If you know. Do you know?

20 THE WITNESS: I independently don't remember. This
21 became an issue, and --

22 THE COURT: All right.

23 BY MR. KANOVITZ:

24 Q. Would it refresh your recollection to see the Miami
25 Valley Regional Crime Lab report?

1 **A.** Yes, sir.

2 MR. KANOVITZ: Could the witness be shown
3 Defendant's Exhibit 13, please.

4 BY MR. KANOVITZ:

5 **Q.** If you look on page 1, towards the bottom, it has Exhibit
6 1, which is B.W.'s clothes, and Exhibit 2, which is C.W.'s
7 clothes. And what color were the head hairs found on those
8 clothes?

9 **A.** On Exhibit 1 on this document, it says that there was
10 two light brown Caucasian head hair.

11 **Q.** And what about, what was the color of the head hair on
12 Exhibit 2?

13 **A.** It says that there was a light brown Caucasian head
14 hair.

15 **Q.** Rewinding, you were asked some questions on Thursday by
16 counsel for Miami Township. Do you recall those questions?

17 **A.** I know that he asked questions, yes.

18 **Q.** Do you recall them using the term "bad faith" when
19 questioning you?

20 **A.** I had heard that term, yes.

21 **Q.** And when you answered those questions, were you using a
22 legal definition or were you using the way you understand
23 those words not as a lawyer?

24 **A.** I don't remember.

25 **Q.** As you use the term "bad faith," would it be bad faith to

1 do something your supervisor had given the okay to?

2 A. Would it be bad faith to do something that my
3 supervisor told me to do?

4 Q. Or at least given the okay to.

5 A. If my supervisor directs me to do something, I'm going
6 to do it.

7 Q. Or if your supervisor knows you are going to do it and
8 says it's okay to do it, would it be the same answer?

9 A. If he knows that I'm going to do something and he is
10 okay with it, yes.

11 Q. In that case, would you believe doing that would be bad
12 faith toward your employer?

13 A. Do I think it would be bad faith? No.

14 Q. As you use that term.

15 A. No. I have my --

16 THE COURT: Okay. He's answered it.

17 BY MR. KANOVITZ:

18 Q. And back in this time frame, Detective-Sergeant Wilson
19 was your supervisor --

20 MR. KANOVITZ? Actually, may I rephrase, Your Honor?

21 THE COURT: Rephrase what?

22 MR. KANOVITZ: The question.

23 THE COURT: The one that he answered?

24 MR. KANOVITZ: No. The one I'm about to -- the one
25 I was saying. I just want to strike it.

1 THE COURT: He has only testified to the name right
2 now.

3 BY MR. KANOVITZ:

4 Q. At the time you were showing the victims the photo array,
5 your supervisor was Detective-Sergeant Wilson, correct?

6 A. Correct.

7 Q. And he was the person as far as -- well, was he the
8 person at Miami Township authorized to look over your
9 shoulder?

10 A. Look over my shoulder, I don't know about that, but he
11 was my supervisor.

12 Q. Okay. And was he also one of the detective pictures that
13 you put into the photo array?

14 A. Yes.

15 Q. So is it fair to say that he knew that you were putting
16 his picture in the photo array?

17 A. Absolutely.

18 Q. And he got a chance to see the photo array, correct?

19 A. Yes, he did.

20 Q. And did he ever tell you that he believed you were not
21 acting in good faith?

22 A. No. He had no issues with it.

23 Q. Did any official of Miami Township ever tell you that?

24 A. No.

25 Q. Did any official at Miami Township ever tell you they

1 believed you were not acting within the scope of your
2 employment?

3 A. Never.

4 Q. Now, as you use the term, would it be bad faith to do
5 something that your employer praised you for?

6 MS. FRICK: Objection, Your Honor. Foundation for
7 what this is.

8 THE COURT: Sustained.

9 BY MR. KANOVITZ:

10 Q. Well, sir, Miami Township ran a training academy for
11 officers from smaller police departments, right?

12 A. They did at one time, yes.

13 Q. Okay. And isn't it true that when they ran that training
14 academy, they used your photo array as an example of what to
15 do?

16 MS. FRICK: Objection.

17 BY MR. KANOVITZ:

18 Q. The Gillispie photo array.

19 MS. FRICK: Objection.

20 THE WITNESS: I do not remember that at all. And I
21 wouldn't have had anything to do with the academy.

22 BY MR. KANOVITZ:

23 Q. Okay. So you had no knowledge of that?

24 A. No.

25 Q. Switching topics, do you recall Miami Township's lawyers

1 asking you about the Fritz and Bailey reports?

2 A. Ask that again.

3 Q. Do you recall the lawyers asking you about the Fritz and
4 Bailey reports?

5 A. I believe they had, yes.

6 Q. And they asked you hypothetically, if you didn't turn
7 over those reports, would that be good faith or bad faith,
8 questions to that effect?

9 A. I believe that was the question.

10 Q. Okay. Now, was the file management practices inside of
11 Miami Township perfect?

12 MS. FRICK: Objection, Your Honor. I think we are
13 going beyond the scope of --

14 THE COURT: I think we are, Counsel.

15 MR. KANOVITZ: If I may, I will ask the following
16 question:

17 BY MR. KANOVITZ:

18 Q. Wasn't it the case that reports would get lost from time
19 to time?

20 MS. FRICK: Objection, Your Honor.

21 THE COURT: I'll allow it.

22 THE WITNESS: It's okay to answer?

23 THE COURT: Yes. If you know.

24 THE WITNESS: From experience of dealing with the
25 reporting department within Miami Township, I knew that

1 reports would be misfiled.

2 BY MR. KANOVITZ:

3 Q. And did Miami Township ever communicate to you that there
4 could be a constitutional violation if reports were misfiled
5 or lost?

6 A. No.

7 Q. And I believe you testified you had no training on how to
8 prepare a photo array from Miami Township?

9 A. From what I remember.

10 Q. And previously, a few minutes ago, I asked you about the
11 ability to alter your reports after you had typed them up. Do
12 you recall that?

13 A. Yes, you did.

14 Q. And you were permitted to do that as well, correct?

15 A. You could, yes.

16 Q. And did you receive any training from Miami Township on
17 the subject of tunnel vision?

18 A. No.

19 Q. Do you know what tunnel vision is?

20 A. I believe that it is where you get something, you focus
21 on one thing at the time.

22 Q. And then other things you don't even see while you are
23 focusing on the one thing, right?

24 A. If we're dealing with the definition, yes.

25 Q. And were you ever taught that that's a hazard that

1 detectives can face?

2 MS. FRICK: Objection, Your Honor.

3 THE COURT: Sustained.

4 BY MR. KANOVITZ:

5 Q. You were asked questions by Miami Township about the
6 concept of, quote-unquote, exculpatory evidence. Do you
7 recall being asked that question?

8 A. Vaguely.

9 THE COURT: Counsel, we are not going to get into
10 exculpatory evidence or any of the definitions. I've already
11 instructed the jury that I will be instructing on what that
12 means.

13 MR. KANOVITZ: Absolutely. I am not going to talk
14 about the definition.

15 THE COURT: All right.

16 BY MR. KANOVITZ:

17 Q. And isn't it true that you said that that's not a concept
18 that you were taught?

19 A. I don't remember what my answer was at the time.

20 Q. It's not a word you knew when you were asked the
21 question, correct?

22 A. I have heard that term before. I independently can't
23 tell you the definition of it.

24 Q. Okay. Now, the allegations about causing -- your
25 involvement in causing Mr. Gillispie an unfair trial had been

1 around for over ten years, have they not?

2 A. Could you ask the question again?

3 Q. Yeah. For over ten years, there's been litigation that
4 you had either involvement in or were questioned about
5 regarding your involvement in causing Mr. Gillispie an unfair
6 trial.

7 A. I don't believe he was caused an unfair trial.

8 Q. I understand that, but you understood that those were the
9 allegations?

10 A. There have been many allegations throughout these
11 years.

12 Q. And did you understand that for over ten years there's
13 been allegations that you were involved in causing an unfair
14 trial to Mr. Gillispie?

15 A. I don't think that anything I did had ever been found
16 to be caused by me.

17 Q. I am not asking you what was found. Just that there were
18 public allegations made that you caused an unfair trial. I am
19 not saying that you did cause an unfair trial; I am just
20 saying that there were public allegations made that you caused
21 an unfair trial.

22 A. There have been statements over a period of years.

23 Q. Well more than a decade, correct?

24 THE COURT: If you know.

25 THE WITNESS: I don't independently recall.

1 BY MR. KANOVITZ:

2 Q. Well, in all of those years, did any official from Miami
3 Township come and ask you questions about the allegations?

4 MS. FRICK: Objection, Your Honor.

5 MR. KANOVITZ: It goes to, I believe, good faith.

6 THE COURT: Sustained.

7 BY MR. KANOVITZ:

8 Q. On Thursday, you were shown pictures of five badges from
9 GM. Do you recall that?

10 A. I believe so, yes.

11 Q. And counsel asked you if you thought they were like and
12 similar, and you basically said, "I don't think so"?

13 A. I don't remember what I said.

14 Q. Okay. Isn't it true that the term "like and similar"
15 originated from you, not from me?

16 A. I would -- I would probably believe so on that, yes.

17 Q. And isn't it true that you previously told a judge that
18 you believed that the GM badges were like and similar?

19 A. In the fact that they are all GM identification cards.

20 MR. KANOVITZ: This will be PX1, page 53, line 18
21 through 21, read for purposes of impeachment.

22 THE COURT: Well, then, what you should do, Counsel,
23 is ask him the question.

24 BY MR. KANOVITZ:

25 Q. Isn't it true that what you said to the judge is that the

1 people in the picture, in the IDs themselves, were like and
2 similar?

3 A. I don't independently remember that, but if you're
4 reading that, then I would have to take it at its face.

5 Q. Is it fair to say that's the sort of terminology you
6 would have used?

7 A. It sounds like something I would say, but I do not
8 independently remember that.

9 Q. Did you ever go to GM to try to find other badges -- I'm
10 sorry -- other employee IDs that you could use for a photo
11 array?

12 A. No.

13 MR. McLANDRICH: Objection; asked and answered.

14 THE COURT: It has been, Counsel. I think -- yes.

15 BY MR. KANOVITZ:

16 Q. Now, you testified that when you met with the victims you
17 read them the showup instructions on the form, right?

18 A. Yes, I read the photographic lineup instructions.

19 Q. And isn't it true that you said more to them than just
20 quoting that form?

21 A. I would say that there were probably other statements,
22 yes.

23 Q. Isn't it true that you said to them, "We have a suspect"?

24 A. I don't know the exact words without seeing the report.

25 Q. Well, was it words to the effect of "We have a suspect we

1 want you to look at"?

2 THE COURT: If you remember.

3 THE WITNESS: I don't remember independently.

4 BY MR. KANOVITZ:

5 Q. I'll come back to that.

6 And isn't it true that in addition to that paragraph, at
7 a later point in time, you told the victims that Dean had died
8 his hair?

9 A. Again, independently, I don't remember that. I know
10 that there were -- something that came up on that.

11 Q. Would it refresh your recollection to see your testimony
12 from the second trial?

13 A. Yes, sir.

14 MR. KANOVITZ: Could the witness be shown
15 Plaintiff's Exhibit 9, page 320, lines 5 through 14?

16 THE COURTROOM DEPUTY: Counsel, can you repeat those
17 pages.

18 BY MR. KANOVITZ:

19 Q. It's Plaintiff's Exhibit Number 9, transcript page 320,
20 which is Exhibit page 65, lines 5 through 14.

21 A. Okay. What are the lines?

22 Q. I think it was 5 through 14. Actually, you know what?
23 Go back to 319 and start at line 23, the question that starts
24 23 on 319.

25 Have you had a chance to read it?

1 **A.** I'm still going through it.

2 THE COURT: Just raise your head when you are done.

3 THE WITNESS: And you wanted me to go to page 320 to
4 what line?

5 BY MR. KANOVITZ:

6 **Q.** 14.

7 **A.** Okay.

8 **Q.** Does that refresh your recollection that you did talk to
9 the women about your opinion that Dean had died his hair?

10 **A.** According to this. I remember us getting into a
11 discussion of coloring hair.

12 THE COURT: Well, the answer is do you remember --
13 state your question, Counsel.

14 BY MR. KANOVITZ:

15 **Q.** Does that refresh your recollection that you had a
16 discussion with the victims where you told them that in your
17 opinion Dean had died his hair?

18 THE COURT: The question is, did you state that in
19 your opinion Dean had died his hair?

20 THE WITNESS: That's not exactly what was said, no.

21 BY MR. KANOVITZ:

22 **Q.** You sat through the criminal trials; is that correct?

23 **A.** Yes.

24 **Q.** And you had a chance to hear all the victims testify,
25 right?

1 A. Yes.

2 Q. And -- and isn't it true that C.W. testified that she had
3 a conversation with you where you talked about Dean having
4 died his hair?

5 THE COURT: If you remember.

6 THE WITNESS: I don't remember a conversation.

7 MR. KANOVITZ: Okay. Could the witness be shown --

8 BY MR. KANOVITZ:

9 Q. Would it refresh your recollection to see the trial
10 testimony?

11 A. Are we done with this testimony?

12 Q. For the moment.

13 A. Yes.

14 MR. KANOVITZ: Could the witness be shown
15 Plaintiff's Exhibit 10, transcript page 421, exhibit page 27?

16 THE WITNESS: Page?

17 BY MR. KANOVITZ:

18 Q. 421, lines 12 through 17. I'm sorry. Start at line 3
19 through 17.

20 A. Whose testimony is this?

21 Q. I believe it is C.W.'s.

22 A. So I'm going to testify to what somebody else said?

23 Q. I am asking you, does that refresh your recollection that
24 C.W. said that you told her that Dean may have died his hair?

25 A. What line do you want me to go to?

1 Q. Line 3 through 17.

2 A. Okay.

3 Q. And does that refresh your recollection that C.W.
4 testified that you had told her that in your opinion Dean had
5 died his hair?

6 A. Yes.

7 Q. Okay. And you sat through the trial. So you would have
8 heard her testify to that, correct?

9 A. Yes.

10 Q. Did you ever tell the prosecutor that that's not true and
11 that the testimony needed to be corrected?

12 A. I don't independently remember what would have been
13 said.

14 MR. KANOVITZ: Sorry, Your Honor. Just a moment.

15 BY MR. KANOVITZ:

16 Q. Do you still have Exhibit 9 in front of you?

17 Okay. On the topic that we were discussing about you
18 mentioning that you had a suspect before showing the arrays,
19 do you recall that questioning a few minutes ago?

20 A. Yes.

21 Q. I believe you testified it would refresh your
22 recollection to see the trial testimony?

23 A. I believe so, yes.

24 Q. Okay. Could you take a look at Plaintiff's Exhibit 9,
25 lines 12 through --

1 MR. McLANDRICH: Page?

2 BY MR. KANOVITZ:

3 Q. I am sorry. Plaintiff's Exhibit 9, transcript page 303,
4 Exhibit page 48, lines 12 through 18 -- I am sorry -- lines 12
5 through 17?

6 A. Page 303?

7 Q. Yes.

8 THE COURT: Counsel, after your next question, we're
9 done for the day.

10 MR. KANOVITZ: Okay.

11 THE COURT: I'm sorry. After his answer, we're done
12 for the day.

13 THE WITNESS: And the lines again?

14 BY MR. KANOVITZ:

15 Q. It's lines 12-17, lines 12 through 17.

16 A. Okay.

17 Q. Does that refresh your recollection that you told them
18 you had suspects for them to look -- you had a suspect for
19 them to look at when you called them and asked them to come
20 see the photos?

21 A. Yes.

22 THE COURT: All right. Ladies and gentlemen, we're
23 done for the day. It's been a long day, a lot of testimony.
24 Appreciate your patience, your attention. Hopefully, you will
25 have a good evening. Please remember the Court's admonitions:

1 Don't discuss the case amongst yourselves or with anyone else.
2 Please ask the family and friends to abide with you for a
3 little while longer.

4 I think that's about it. Anything else, counsel?

5 MR. KANOVITZ: Not at the present time.

6 MR. McLANDRICH: No. Thank you, Your Honor.

7 MS. FRICK: No. Thank you, Your Honor.

8 THE COURT: Ladies and gentlemen, have a great
9 evening.

10 Same time tomorrow.

11 THE COURTROOM DEPUTY: All rise. This court stands
12 in recess.

13 (Jury out at 4:27 p.m.)

14 (Court adjourned at 4:27 p.m.)

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1 CERTIFICATE OF REPORTER

2
3 I, Mary A. Schweinhagen, Federal Official Realtime
4 Court Reporter, in and for the United States District Court
5 for the Southern District of Ohio, do hereby certify that
6 pursuant to Section 753, Title 28, United States Code that the
7 foregoing is a true and correct transcript of the
8 stenographically reported proceedings held in the
9 above-entitled matter and that the transcript page format is
10 in conformance with the regulations of the Judicial Conference
11 of the United States.

12
13 s/Mary A. Schweinhagen

14 _____ 21st of December, 2023

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16 FEDERAL OFFICIAL COURT REPORTER
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